

No. 12503

United States
Court of Appeals
For the Ninth Circuit.

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 433 to 872)

Appeal from the District Court
for the Territory of Alaska
Third Division

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Mr. McCutcheon: Call Dorothy Cavin.

DOROTHY CAVIN

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you kindly state your name, Mrs. Cavin and spell your name for the Clerk.

A. Cavin, C-a-v-i-n, Dorothy.

Q. Do you live here in Anchorage?

A. Yes, I do.

Q. During the year, 1948, did you have the restaurant business in the Panhandle Cafe?

A. Yes, I did.

Q. And what months?

A. Well, we started out in August 1st to December 21st when it burned down.

Q. I hand you an article and ask you to tell me what it is?

A. This is my book that I had for the restaurant.

Q. From whom did you purchase the restaurant business?

A. Well, the way we did it, it was from Joe Blackard and Glen Phillips.

Q. Had you known Joe Blackard for a period of time?

A. We used to go in there and have a few drinks in the evening when we first came to town. We got to going in there and [418] they treated us nice

(Testimony of Dorothy Cavin.)

so we used to go in there and drink with them and visit.

Q. You became friendly with Mr. Blackard, did you not?

A. Yes, we did later on. Yes, we did.

Q. And that friendship still exists, does it not?

A. They have never ever done anything to us in a way we shouldn't be friends.

Q. And you were subpoenaed by the plaintiff, Mr. Humphries, to appear here, were you not?

A. That is right.

Q. Now, at the time you took over the restaurant business, Mrs. Cavin, what articles of equipment did you receive?

A. Well, everything that was in the restaurant, that is, the stove and the dishes and those saws and everything that was there we used it.

Q. Did you purchase the business or lease it or how?

A. No, we didn't, we didn't have no lease or anything. We worked on a 10 per cent basis.

Q. And who received the 10 per cent?

A. Well, we used to give it to Glen every day.

Q. Give it to who?

A. Glen Phillips. Every morning we paid the percentage on it.

Q. You gave him 10 per cent of the gross receipts, did you? A. That is right. [419]

Q. And the balance was yours?

A. That is right.

(Testimony of Dorothy Cavin.)

Q. Well, you were more or less in business with them, is that right?

A. No, we weren't; we just went in there and worked for ourselves and we just paid them the 10 per cent.

Q. Well, the 10 per cent was for rent, was it?

A. Evidently that is what it was. We used to give them just 10 per cent. We didn't know what they did with it.

Q. That was in lieu of rent?

Mr. Cottis: I object, Mr. McCutcheon is putting words in this witness' mouth. She hasn't said anything about rent. I object further on grounds what the relationship was between Blackard and Phillips and Mrs. Cavin as completely irrelevant to the issues of this case.

Mr. McCutcheon: It is preliminary, sir. I hope to show——

The Court: The objection is overruled on the last grounds stated because it may be preliminary, but counsel should avoid leading the witness.

Q. (By Mr. McCutcheon): Have we ever discussed the facts that you are now testifying to, Mrs. Cavin?

A. I didn't understand what you mean by that?

Q. Have I ever discussed with you the facts that you are now testifying to? [420]

A. What I am testifying against?

Q. No, you misunderstood. Have we ever previously discussed between you and I the facts that

(Testimony of Dorothy Cavin.)

you are now testifying to? A. No.

Mr. Cottis: Your Honor, I object to that. It is not proper examination on a direct examination.

The Court: Overruled, you may answer.

Q. (By Mr. McCutcheon): Now, was the 10 per cent—I will withdraw that. Did you pay rent, Mrs. Cavin?

A. No, that wasn't rent. I wouldn't say it was rent, it was on a 10 per cent basis we worked it and what they used to do with that was to pay our oil and anything that went wrong with the Frigidaires they paid out of that and the lights they paid.

Q. Did they pay the fuel for your ranges?

A. Absolutely, they paid it all.

Q. And all the electricity?

A. Everything. And if anything went wrong with the Frigidaires they paid it.

Q. And did you pay anything for the privilege of going in business there?

A. No, we didn't. That is all. I paid for all the groceries I got from Frozen Supply and I paid cash for that.

Q. Was there any inventory when you took over?

A. There wasn't anything. There was about one case of sauerkraut [421] in the basement and that is all.

Q. Who had operated the restaurant just prior to you? A. Before me?

Q. Yes, Ma'am.

(Testimony of Dorothy Cavin.)

A. I believe it was Jack Carr or Jack Guard, I don't recall his exact name.

Q. Do you know how long he had operated the restaurant?

A. I know he wasn't in there very long. It couldn't have been more than four or five weeks at the most.

Q. But there was no inventory whatsoever of consumable supplies when you took over?

A. Nothing, just about one case of sauerkraut, as I remember, and I never used it at all, still in the basement.

Q. Did you have the keys to the storeroom?

A. Yes, I did.

Q. Who gave you the keys to the storeroom?

A. The way it was there was no keys on that storeroom, because we had to buy padlocks, because once in a while we had quite a bit of meat in the back and we thought something would be missing so we bought the padlocks ourselves and put it on there.

Q. With whom did you do business and whom did you purchase your supplies from for the restaurant?

A. We used to get most of our stuff from Alaska Merchandise.

Q. That is Mr. Castlio's, is that right? [422]

A. Jack is all I know him by.

Q. Do you recall the value of your inventory?

A. No, I don't.

(Testimony of Dorothy Cavin.)

Q. Would you carry \$500 worth of supplies on hand?

Mr. Cottis: I object, Your Honor, to these leading questions and I don't see the relevance.

The Court: Objection is sustained on both grounds.

Q. (By Mr. McCutcheon): Did you carry an inventory, Mrs. Cavin?

A. No, I didn't, I never did take inventory after I was in there.

Q. Were you in the premises, that is, were you in business in the premises when it burned?

A. Yes, I was.

Q. Do you have any idea of the value of your inventory at the time of the fire?

Mr. Cottis: Your Honor, I object on grounds of relevancy.

Q. (By Mr. McCutcheon): Can you tell me what items of equipment you used in connection with the restaurant business?

Mr. Cottis: Same objection.

The Court: Overruled.

Q. (By Mr. McCutcheon): Mrs. Cavin, could you tell me what items of restaurant equipment you used while you were in business there? [423]

A. Well, I used everything that was there, all the dishes and we used the saws, the meat grinder.

Q. Dishes? A. That is right.

Q. Meat grinder?

A. And there was a saw there and a cuber.

(Testimony of Dorothy Cavin.)

Q. An electric saw? A. That is right.

Q. And an electric cuber?

A. That is right.

Q. Pots and pans were there?

A. Yes, there was.

Q. Anything else?

A. Well, no, there wasn't and then the silver-ware there was a lot of that there, we used that.

Q. Glass ware?

A. No, there might have been two or three but I had to buy them.

Q. Was the restaurant more or less equipped to do business when you took over?

A. Yes, it was, it was fully equipped.

Q. Except for the inventory and supplies?

A. There was nothing there.

Q. You had an icebox, did you?

A. Yes, I did, but the box I don't think it must have not belonged [424] to the place because it had a sign on it that it was not to be moved from there, that there was an attachment on it.

Q. Did Mr. Blackard tell you who owned the equipment?

A. No, he didn't and we never asked him.

Q. Now, referring to your records, will you turn to the page marked by the yellow sheet, what does that page reflect?

Mr. Cottis: Your Honor, I object unless he is either going to try to introduce that volume into evidence or ask a question, if she wants to refresh

(Testimony of Dorothy Cavin.)

her recollection, but to have her read into testimony from something that is not in evidence is objectionable.

The Court: Overruled, what does counsel have to say.

Mr. McCutcheon: I was about to tell the Court what I was trying to do so that the Court would know how to rule.

The Court: I will be glad to hear from counsel.

Mr. McCutcheon: I hope to show by the four or five months that the witness was in business there, show the average daily gross of that business at that time.

Mr. Cottis: Well, Your Honor, if that is what counsel intends to do I certainly object strenuously. What Mrs. Cavin's operation might have been there has no bearing at all on what Humphries operation was.

Mr. McCutcheon: May I be heard further?

The Court: Yes.

Mr. McCutcheon: It was during the period of time that [425] Mr. Humphries' contract and Mr. Campbell's contract with Starns and Phillips and Blackard was yet to run.

Mr. Cottis: Your Honor, object to counsel's way of putting that. There is no evidence at all of any contract at all with Starns. The contract itself is in evidence and speaks for itself and Starns' name isn't on it.

The Court: Jury will have to decide whether

(Testimony of Dorothy Cavin.)

Starns was a party to the contract or not. There has been some evidence about Mr. Starns. That objection is overruled. Counsel may proceed with the examination.

Q. (By Mr. McCutcheon): Mrs. Cavin, does the page that you now refer to in your record there, does that reflect your operation for a certain period of time there?

Mr. Cottis: Your Honor, I object to the leading question.

The Court: Overruled. State whether or not it does.

Q. (By Mr. McCutcheon): I would like to have you state whether or not that page of that document you have before you reflects your gross income from your business during a certain period of time, several months?

A. Well, the way she has got it fixed out here, I really couldn't answer that question clearly.

Q. Who do you refer to as "she"?

A. The bookkeeper, Lilly Nelson, she kept my books for me. [426] The way she has got it written here she would have to explain it more thoroughly to me.

Q. Do you recall — you needn't refer to that any further — Do you recall what your average monthly gross take was in the business?

A. How much we took in every month?

Q. Yes.

(Testimony of Dorothy Cavin.)

A. I couldn't really tell you right out.

Q. Do you recall what your average monthly net might have been.

Mr. Cottis: Your Honor, to make the record clear I assume that all this is over my objection?

The Court: If counsel so wishes. But any objection made to the net will be sustained because the net all depends on — I am going to permit the witness to testify, if she knows, what the gross income was and that all goes in over counsel's objection and exception.

Mr. McCutcheon: Do you recall what your gross might have been?

A. I couldn't tell you right out but I think it was about six or seven thousand dollars a month and I don't think November on and December did that well.

Q. Were there any card games played while you were there on the premises?

A. Not that I ever saw. [427]

Q. Were there card tables there?

A. No, there wasn't because we went down to the Northern Commercial and we bought another table for our customers to eat on and there was two of them down there and that is the only thing that those tables was ever used for was for people to eat there.

Mr. McCutcheon: Your witness.

(Testimony of Dorothy Cavin.)

Cross-Examination

By Mr. Cottis:

Q. Mrs. Cavin, have you ever discussed this case with Mr. Humphries or Mr. Campbell?

A. No, I haven't.

Q. Now, as I understand it, you testified that you paid Blackard and Phillips 10 per cent of your gross receipts, is that correct?

A. That is right.

Q. Was there any arrangement between you and Blackard and Phillips regarding a monthly minimum charge that you would pay?

A. No, there wasn't. That is all we went in was on a 10 per cent basis. What we made we gave them 10 per cent on it.

Q. And they paid all fuel and electricity?

A. That is right, and Frigidaires, anything that went wrong — the motors — they paid for it.

Q. And when you negotiated that arrangement with them did Mr. Starns have anything to do with it? [428]

A. I never knew that Larry Starns ever had anything to do with that because he never used to come in that I ever saw him.

Q. Is that book that is lying near you, is that your account book?

A. Well, this is for income tax and tax record and everything that we bought. It is just for the

(Testimony of Dorothy Cavin.)

restaurant, everything that we bought and took in and that is what she used to keep our records in.

Q. Have you had the book in your possession?

A. No, I haven't; in fact, we thought that the book was burned up and we had to go down when we went down to the States. We had an awful time trying to file our income tax and all the girls' Social Security and everything, and we had to hire lawyers down there to fix up our records and everything. We paid income tax and we didn't know whether it was right or not. We gave them a rough estimate down in Butte.

Q. How long since you have found the book?

A. Well, the way I found it was when Mr. McCutcheon and Humphries filed—I mean subpoenaed me — they told me that they had the books up in the office and if I wanted to come up and look them over that I could and that is the first time that I knew that the books were still in good shape. I thought they were burned up.

Q. With whom were you talking about the books?

A. With Mr. McCutcheon. He came down to the restaurant where [429] I work. He told me if I would like to come up and look them over and identify them to see if they were mine or not.

Q. Did you not testify to Mr. McCutcheon that you had not talked with him about this case?

A. Well, I didn't talk anything about it but

(Testimony of Dorothy Cavin.)

what he did, he came down and said that I would be subpoenaed and not to be afraid of anything and that was all he said, and then he said he had the books if I would like to come up and see.

Q. Did you ever go up and look?

A. No, I didn't, it seemed like I never got around to it. When I got through working I would go home.

Q. You haven't seen that book since the fire?

A. No, I haven't, I thought it was burned up.

Q. And that was last December?

A. December 21st it burned.

Q. And it was not until the subpoena was served on you that you knew that it was still in existence?

A. That was the first time I heard about it was when the subpoena was going to be served on me. He told me about it.

Q. Did he tell you how he obtained possession of it?

A. No, he didn't, not that I can recall. I don't remember him telling me.

Mr. Cottis: No further questions.

Mr. McCutcheon: No redirect.

The Court: Jurors have any questions? [430]

(No response.)

The Court: That is all, Mrs. Cavin. You may step down. Mr. McCutcheon, do you wish this book, it is not in evidence?

Mr. McCutcheon: No, I am not going to offer it, Your Honor.

(Testimony of Dorothy Cavin.)

The Court: I assumed that, I simply wanted to get it off the witness stand.

Mr. Cottis: Perhaps Mrs. Cavin would like it back.

Mr. McCutcheon: I intended to return it to her just as soon as the trial is over.

The Court: Another witness may be called.

Mr. McCutcheon: If the Court please, may I have a brief recess at this time. First I would like to inquire of the Bailiff if Mr. Hilgilien has shown in the witness room yet?

Bailiff: No, he has not.

Mr. McCutcheon: May I have a brief recess, Your Honor.

The Court: The Court will stand in recess for 5 minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present. Another witness may be called.

Mr. McCutcheon: If the Court please, I have prepared an affidavit of service with attached subpoena and would like to present it to the Court and move at this time that a bench warrant issue for the arrest of R. E. Hilgilien.

The Court: Bench warrant may issue accordingly. The [431] paper may be filed.

Mr. McCutcheon: Call W. G. Spradlin.

Bailiff: He is not in the witness room.

Mr. McCutcheon: Call Mr. Campbell.

MARVIN CAMPBELL

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name?

A. Marvin Campbell.

Q. How long have you lived in Anchorage, Mr. Campbell? A. I was born here.

Q. How old are you? A. 25.

Q. Where does your mother reside now?

A. Seattle, Washington.

Q. Were your mother and father formerly the owners of the Panhandle premises?

A. Yes.

Q. And your father passed away, did he?

A. Yes, 1943.

Q. And left the premises to your mother, did he? A. Yes.

Q. And for how long a period of time did she own the Panhandle [432] premises?

A. She owned it right up until February of this year.

Q. Following the death of your father who occupied the Panhandle premises?

A. Tibbitts had a lease on the place, '41 up until last January.

Q. And to whom did Tibbitts sell the property—his lease?

(Testimony of Marvin Campbell.)

A. He sold his lease to Larry Starns and Joe Blackard.

Q. And did Tibbitts have a lease, did he?

A. Yes.

Q. I hand you a piece of paper and ask you to identify this, if you can?

A. This was the last lease that was signed for the Panhandle between my mother and Mr. Tibbitts.

Q. What is the date on that lease?

A. 13th day of January, 1948.

Q. And who is it signed by?

A. signed by my mother, Anna K. Campbell and C. W. Tibbitts, and witnessed by our lawyer, Alexander Cain.

Mr. McCutcheon: I would like to offer it in evidence.

The Court: It may be shown to counsel.

Mr. Cottis: May I inquire from the witness concerning this, Your Honor?

The Court: Yes.

Mr. Cottis: Mr. Campbell, did you see this lease signed [433] by your mother?

The Witness: Yes.

Mr. Cottis: Did you see it signed by Mr. Tibbitts?

The Witness: No, Mr. Tibbitts signed it in a different room.

Mr. Cottis: Did you see Mr. Cain sign it as a witness?

(Testimony of Marvin Campbell.)

The Witness: Yes.

Mr. Cottis: All this took place in Seattle, did it?

The Witness: Yes, in the law offices of Alexander Cain.

Mr. Cottis: Have you had custody?

The Witness: That came out of the files of Alexander Cain.

Mr. Cottis: Did you get it from his files?

The Witness: Yes.

Mr. Cottis: How long ago?

The Witness: I got it when I came up here in February.

Mr. Cottis: Of this year?

The Witness: Yes.

Mr. Cottis: And have you had custody of it since that time?

The Witness: Yes, I have, it has been in a sealed envelope.

Mr. Cottis: And, of course, there have been no alterations or anything made to it while it has been in your custody?

The Witness: No reason for altering it. [434]

Mr. Cottis: Have you ever seen Mr. Tibbitts sign his name?

The Witness: I believe I have.

Mr. Cottis: Do you know his handwriting?

The Witness: Yes.

Mr. Cottis: Well, Your Honor, I object to the

(Testimony of Marvin Campbell.)

introduction of this in evidence on grounds it has not been authenticated and on the further grounds that it is irrelevant.

The Court: May I see the paper?

Mr. McCutcheon: I would like to be heard on the question before the Court rules.

The Court: The paper bears a certificate of acknowledgement of execution by Tibbitts and another certificate with acknowledgement by Anna K. Campbell. While it may not be relevant perhaps it will be during the course of the trial. The objection is overruled and may be admitted.

Mr. Cottis: May I state a further objection, Your Honor, for the record?

The Court. Yes.

Mr. Cottis: I object on the further grounds that the acknowledgements are out of the Territory of Alaska and that therefore the Court has no power to take judicial notice of whether that notary was a proper notary public.

The Court: It may be admitted and marked Plaintiff's Exhibit 17, I believe. [435]

The Clerk: 17, yes, sir.

The Court: And may be read to the jury.

Mr. McCutcheon: Lease.

"This indenture, made and entered into this 13th day of January, 1948, by and between Anna K. Campbell of Seattle, Washington, party of the first part, hereinafter referred to as the Lessor, and C.

(Testimony of Marvin Campbell.)

W. Tibbitt of Anchorage, Alaska, party of the Second Part, hereinafter referred to as the Lessee;

“Witnesseth:

“1. The Lessor does hereby lease to the Lessee and Lessee hereby leases from the Lessor those certain premises situated in the City of Anchorage, Third Division, Territory of Alaska, and more particularly described as follows, to wit:

“The West Thirty Feet (30') of Lot Two (2) Block Forty-four (44) of the original townsite of Anchorage, Alaska, according to the official map and plat thereof.”

Together with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise pertaining.

“2. The premises are to be used for the purpose of conducting therein a restaurant, liquor store, saloon, card room and any legitimate merchandise business.

“3. The term of this lease shall be for three years and shall commence on the 1st day of January, 1948, and end on the 31st day of December, 1950, inclusive. [436]

“4. Lessor covenants and agrees to pay the Lessor as rental for said premises the monthly rental of \$400.00 in lawful money of the United States in advance on the 1st day of each calendar month of the lease term, to Lessor at Seattle, Washington,

(Testimony of Marvin Campbell.)

or to such other party or at such other place as the Lessor may hereafter designate.

“5. As partial consideration for the execution of this Lease, the lessee has heretofore paid the Lessor the sum of \$300.00 to apply on the \$400.00 monthly rental due for the month of December, 1950, the receipt of which is hereby acknowledged. If the Lessee shall have fully complied with all of the covenants, agreements, terms and conditions of this lease, but not otherwise, said sum so paid shall be credited on the payment of the rental due for the said month of December, 1950.

“6. The premises are accepted by Lessee in their present condition, and Lessee will at all times keep the premises neat, clean and in a sanitary condition, and will replace any glass of all windows and doors as may become cracked or broken, and except for reasonable wear and tear and damage by fire or other unavoidable casualty, will at all times preserve said premises in as good repair as they now are or may hereafter be put to. All repairs shall be at Lessee's sole cost and expense.

“7. The Lessee hereby covenants and agrees to pay all charges for light, heat and water which shall be charged against the leased premises during the full term of this lease. [437]

“8. All personal property on the leased premises shall at the risk of the Lessee. Lessor shall not be liable for any damage either to person or property sustained by Lessee or others caused by any defects

(Testimony of Marvin Campbell.)

now in said premises or hereafter occurring therein, except that the same occur by reason of defects in the walls, roof or foundation of said premises and shall not be liable for any act of negligent employees, co-tenants or other occupants of said building.

“9. Lessee agrees that he will keep said premises and use the same in accordance with the laws of Alaska and according to the Ordinances of the City of Anchorage, and in accordance with all directions, rules and regulations of the health officer, fire marshal, building inspector, or other proper officer of the City of Anchorage, at the sole cost and expense of the said Lessee, except that which pertains to the roof, outer walls and foundation. The Lessee will permit no waste, damage or injury to the premises. Lessee shall be liable for the removal of ice and snow on the sidewalks in front of and about the said premises.

“10. The Lessee will not use the premises for illegal purposes.

“11. Lessee shall keep the leased premises and the property on which the leased premises are situated, free from any liens arising from any work performed, materials furnished or obligations incurred by lessee. [438]

“12. Lessee agrees that he will not, without the written consent of the Lessor, assign this lease, or let or sub-let the whole thereof, or any part thereof,

(Testimony of Marvin Campbell.)

except that the Lessee can assign the whole of this lease once only. In the event this Lessor, pursuant to the foregoing provision for one assignment, does assign this lease, Lessor shall not be barred from afterwards refusing to consent to any further assignment.

“13. The Lessee shall allow the Lessor or Lessor’s agents free access at all reaonable times to said premises for the purpose of inspection or making repairs thereto in pursuance to Lessor’s obligations under this lease. The Lessor shall have the right to place and maintain “For Rent” signs in a conspicuous place on said premises for thirty days prior to the expiration of this lease.

“14. Lessee shall not make any alterations or additions or improvements on said premises without the written consent of the Lessor first had and obtained and all alterations and improvements which shall be made, shall be at the sole cost and expenses of Lessee and shall become the property of the Lessor and shall remain in and be surrendered with the premises as a part thereof at the termination of this lease.

“15. If any rents above reserved, or any part thereof, shall be and remain unpaid when the same shall become due, or if Lessee shall violate or default in any of the covenants and agreements herein contained, then the Lessor may cancel this [439] lease upon giving the notice required by law, and re-enter said premises, but notwithstanding such

(Testimony of Marvin Campbell.)

re-entry by the Lessor, the liability of the Lessee for the rent provided for herein shall not be extinguished for the balance of the term of this lease, and Lessee covenants and agrees to make good to the Lessor any deficiency arising from a re-entry and reletting of the premises at a lesser rental than herein agreed to.

“16. The failure of the Lessor to insist upon strict performance of any of the covenants and agreements of this lease, or to exercise any option herein conferred in any one or more instances, shall not be construed to be a waiver or relinquishment of any such or any other covenants or agreements, but the same shall be and remain in full force and effect.

“17. Any holding over after the expiration of said term, with the consent of the Lessor, shall be for an indefinite period of time on a month to month basis, which tenancy may be terminated as provided by the Laws of the Territory of Alaska, and during such tenancy the Lessee agrees to pay to the Lessor the same rate of rental as set forth herein and agrees to be bound by all of the terms, covenants and conditions as herein specified, so far as applicable.

“18. Subject to the provisions hereof pertaining to assignment and subletting, the covenants and agreements of this lease shall be binding upon the heirs, legal representatives, successors and assigns of any or all of the parties hereto. [440]

(Testimony of Marvin Campbell.)

“19. That at the termination of this lease, Lessee will quit and peaceably surrender said premises in as good condition as reasonable use and wear thereof will permit, damage by fire or the elements excepted.

“20. It is further provided and agreed that the Lessee shall and will protect the plumbing and light fixtures now in and used in connection with said premises, at his own proper cost and expense; pay all imposition assessed against him for the use of said property promptly, and before delinquency, and protect said premises against mechanics’ as well as other liens.

“21. If the Lessor does assign this Lease in pursuance with the authority so to do in paragraph 12 hereof, the Lessor agrees that the said assignee will assume all of the obligations of the Lessee under this lease.

“In Witness Whereof, the said parties have hereunto set their hands and seals on the day and year first hereinabove written.

“/s/ MRS. ANNA K. CAMPBELL,
“Lessor.

“Witnesses:

“/s/ ALEXANDER L. CAIN,

“/s/ C. W. TIBBITT
“Lessee.

(Testimony of Marvin Campbell.)

‘State of Washington,

‘County of King—ss. [441]

“This Is To Certify that on this 13th day of January, 1948, before me, the undersigned, a notary public, in and for the State of Washington, duly commissioned and sworn as such, personally appeared Anna K. Campbell, known to me to be the particular individual named in and who executed the foregoing instrument as lessor, and she acknowledged to me that she signed and sealed the same freely and voluntarily for the uses and purposes therein stated.

“Witness my hand and Notarial Seal the day and year last above written.

“/s/ ALEXANDER L. CAIN,

“Notary Public in and for the State of Washington,
Residing at Seattle.

“My Commission expires January 28, 1950.

[Seal] “/s/ ALEXANDER L. CAIN,

“State of Washington

“Notary Public

“Commission Expires Jan. 28, 1950.

“State of Washington,

“County of King—ss.

“This is to certify that on this 13th day of January, 1948, before me, the undersigned, a Notary Public, in and for the State of Washington, duly

(Testimony of Marvin Campbell.)

commissioned and sworn as such, personally appeared C. W. Tibbitt, known to me and known to be the particular individual named in and who executed the foregoing [442] instrument as lessee and he acknowledged to me that he signed and sealed the same freely and voluntarily for the uses and purposes therein stated.

“Witness my hand and Notarial Seal the day and year last above written.

“/s/ ALEXANDER L. CAIN.

“Notary Public in and for the State of Washington,
Residing at Seattle.

“My commission expires on Jan. 28, 1950.

[Seal] “ALEXANDER L. CAIN,

“State of Washington

“Notary Public

“Commission expires Jan. 28, 1950.”

Q. Now, following the execution of that lease, Mr. Campbell, was the lease assigned?

Mr. Cottis: Your Honor, I object to the leading questions.

The Court: Overruled.

The Witness: Yes, sir. The lease was assigned to Larry Starns and Joe Blackard.

Q. (By Mr. McCutcheon): And will you state the negotiations that were carried on in connection with that assignment, the time and the place and the persons present, what was said and done.

(Testimony of Marvin Campbell.)

Mr. Cottis: Your Honor, if the assignment was reduced [443] to writing it will speak for itself.

The Court: Negotiations are of no consequence if the assignment was put in writing.

Q. (By Mr. McCutcheon): Was the assignment put in writing? A. Yes.

Q. Who was the lease assigned to?

A. Larry Starns and Joe Blackard.

Q. Did the parties continue to hold the premises under that lease? A. Yes.

Q. Did they continue to hold the premises with the consent of your mother?

Mr. Cottis: Object to the leading questions.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): Was the lease ever terminated?

A. Yes, we terminated on the 10th of April.

Q. How?

A. By written letters in which I personally presented Mr. Blackard and Mr. Starns.

Q. Were you representing your mother at that time? A. Yes.

Q. What authority did you have to represent her?

A. I have always taken care of the family business and I had [444] a power of attorney at that time.

Q. And why did you serve such a notice?

A. Because it appeared to me that——

Mr. Cottis: I object, Your Honor, what it appeared to Mr. Campbell.

(Testimony of Marvin Campbell.)

The Court: I don't see that that is relevant at all what happened in April of 1949.

Mr. McCutcheon: Well, it is preliminary to showing why notice was served on Mr. Humphries. It is preliminary to showing the defendant's reason for serving a notice terminating Mr. Humphries' lease.

The Court: All right, counsel may proceed upon that theory.

Q. (By Mr. McCutcheon): When was the notice served, approximately?

A. I served it on the 10th of April.

Q. And why?

Mr. Cottis: Same objection, Your Honor.

The Court: Overruled.

The Witness: Because in my estimation they had violated the lease.

Q. (By Mr. McCutcheon): How had they violated the lease?

A. They had allowed people to sublease portions of the premises.

Mr. Cottis: I object, Your Honor, that is a conclusion. [445]

The Court: Overruled.

Q. (By Mr. McCutcheon): Will you explain that in detail, please?

The Court: How is Humphries concerned in this? We don't care anything about any squabble between Mrs. Campbell and Starns on one side and Starns and Blackard on the other. How does this concern Humphries?

(Testimony of Marvin Campbell.)

Mr. McCutcheon: It would concern Mr. Humphries in this way, Your Honor, that I will endeavor to show to the jury the true reason for Mr. Blackard serving a notice terminating Mr. Humphries' lease.

The Court: Well, if counsel can show that it is relevant. Overruled.

Mr. McCutcheon: May I proceed?

The Court: You may proceed. All right, witness may answer.

The Witness: Well, I found out after the place was opened up that they had signed several subleases on the premises.

Q. (By Mr. McCutcheon): To whom?

A. They signed one with Vern Humphries. They signed another with Columbia Air Cargo.

Mr. Cottis: Your Honor, it is apparent on the face of it that the only source of the witness' knowledge must have been hearsay and I object on that ground. [446]

The Court: Objection is sustained unless there is something else. So far as Humphries is concerned, I presume that the witness relies upon the written instrument or series of them that have been put in evidence here.

Q. (By Mr. McCutcheon): What was done in the premises that you considered a violation of the lease?

A. They allowed gambling on the premises.

Q. And did you complain about it?

A. Yes, we had some discussion about the thing.

Q. Now, when did you become engaged in business with Mr. Humphries?

(Testimony of Marvin Campbell.)

A. He cut his finger off in an accident and he was laid up in bed so I took over the restaurant.

Mr. Cottis: Your Honor, the answer was not responsive and I ask that it be stricken.

The Court: Motion is denied.

Q. (By Mr. McCutcheon): I hand you a piece of paper and ask you to tell what it is, if you can?

A. That is the assignment that Tibbitt entered into with Starns and Blackard on the lease.

Q. Who is it signed by?

A. Signed by C. W. Tibbitt, Laurence Starns and Joe Blackard.

Q. What is the date on it? [447]

A. 27th of January, 1948.

Mr. McCutcheon: I will offer it in evidence.

The Court: Is there objection?

Mr. Cottis: I would like to look at it, Your Honor.

The Court: Is there objection?

Mr. Cottis: Yes, Your Honor, I object unless it is authenticated, unless the rest of the transaction which was in writing is also produced.

The Court: Let me see the paper. Objection is overruled and the assignment of lease may be admitted in evidence and appropriately marked and may be read to the jury. Marked Plaintiff Exhibit No. 18.

Mr. McCutcheon: May I take it from the file in the other case?

The Court: It may be taken from the file and

(Testimony of Marvin Campbell.)

a paper inserted indicating where it has been removed.

Mr. Cottis: May it please the Court, we have some witnesses waiting in the witness room and I don't think there is a possibility of getting to them this afternoon, so I would like the Bailiff to ask them to return tomorrow morning at 10:00.

The Court: Does the Bailiff know the names of the witnesses? You had better go with him.

Mr. McCutcheon: "Assignment of Lease:

"This Document, executed in duplicate at Anchorage, Alaska, the 27th day of January, 1948, by C. W. Tibbitt of Anchorage, [448] Alaska, hereinafter referred to as Tibbitt, and Laurence Starns and Joseph Blackard, both of Anchorage, Alaska, hereinafter referred to as the assignees.

"Witnesseth:

"That pursuant to paragraph twelve (12) of a certain Lease Agreement dated January 13, 1948, between Anna K. Campbell and C. W. Tibbitt pertaining to certain property in the city of Anchorage, Alaska, more particularly described as:

"The West Thirty Feet (30') of Lot two (2), Block Forty-four (44) of the original townsite of Anchorage, Alaska, according to the official map and plat thereof,

Tibbitt hereby assigns, transfers and sets over to the assignees as tenants in common, and not as joint tenants, all his right, title and interest in said premises by virtue of such lease agreement; and

(Testimony of Marvin Campbell.)

the assignees hereby assume all liabilities under the said lease agreement and agree to pay each month's rent as it becomes due, commencing with the rentals due February 1, 1948.

"This assignment is made for valuable consideration, receipt whereof is hereby acknowledged by Tibbitt; and this assignment is conditioned upon the transfer of a certain liquor license now held by Tibbitt to Joseph Blackard within thirty (30) days from the date hereof.

"In Witness Whereof, the parties hereto have set their [449] hands and seals the day and year first above written.

"/s/ C. W. TIBBITT,

"C. W. TIBBITT,

"/s/ LAURENCE STARNES,

"LAURENCE STARNES,

"/s/ JOE BLACKARD,

"JOE BLACKARD."

The Court: Will counsel suspend for a moment? The witnesses in the witness room who have already testified wish to know whether they may leave now or whether they are required to remain here.

Mr. McCutcheon: All witnesses for the plaintiff may be excused, if the Court please, they have already testified.

The Court: Very well, then, they may be excused. Counsel may proceed.

Q. (By Mr. McCutcheon): Mr. Campbell, what

(Testimony of Marvin Campbell.)

was the consideration for the assignment of that lease? A. Tibbitt paid us \$2,000.

Q. Now, what did Tibbitt own in the Panhandle premises?

A. He owned a liquor license.

Q. Did he own anything else?

A. No, he didn't.

Q. Did your mother own everything?

Mr. Cottis: Your Honor, I object. It is obviously without [450] the witness' knowledge and it is a conclusion of law as to whether his mother was the owner of it.

The Court: Overruled.

Q. (By Mr. McCutcheon): Do you know what your mother owned?

A. Yes, I made up the inventory at the time that Tibbitt took it over and he paid us for the stock and all the equipment that was in the Panhandle was turned over to Tibbitt. He had a completely stocked bar-card room.

Q. State, if you know, what was paid for the assignment of the lease by Starns and Blackard?

A. I haven't any idea. I didn't have anything to do with the negotiations.

Q. Do you know what was paid by Starns and Blackard to Tibbitt for the assignment?

A. They paid him something like \$20,000 for the lease.

Mr. Cottis: Your Honor, I object because it is obviously hearsay.

(Testimony of Marvin Campbell.)

The Witness: I have checks to show for it.

The Court: How can you know that, Mr. Campbell, were you present at the negotiations or did somebody tell you that?

The Witness: I have Mr. Blackard's checks.

Mr. Cottis: I didn't catch the answer.

The Witness: In Mr. Blackard's checkbooks, his records of it.

The Court: Which are in your possession? [451]

The Witness: Yes.

The Court: The answer may stand.

Mr. Cottis: Your Honor, it is still hearsay whether it is a check book or not and I continue my objection. I would like to know how he acquired possession of Mr. Blackard's check book?

The Court: That can be brought out on cross-examination. Counsel may renew his objection later; for the present it will be overruled.

Q. (By Mr. McCutcheon): Now, what was sold for \$20,000 besides the lease?

A. I haven't the slightest idea. They probably sold their stock of liquor. I don't know what else they had.

Q. Now, what happened following the service of a notice terminating the lease?

A. Nothing happened until we started a lawsuit over it.

Q. And when did you commence the lawsuit?

A. Right after about ten days after we served this notice on them.

(Testimony of Marvin Campbell.)

Q. Now, how long following your service of a notice terminating the lease were you and Humphries served with a notice terminating your sublease? A. About five days.

Q. Now, when you went in business with Mr. Humphries, what equipment did he have possession of? [452]

A. He had apparently owned all the equipment in the Panhandle Restaurant so far as I know.

Q. And what did that equipment consist of?

A. Well, in the back——

Mr. Cottis: I object to what he apparently owned. If Mr. Campbell actually knows——

The Court: The question will be stricken.

Mr. McCutcheon: The question was, What equipment did he have possession of?

The Court: Yes, he may answer that—what equipment he had possession of but the witness said, “He apparently owned,” that is not responsive to the question. You may answer the question—what equipment he had possession of?

The Witness: He had a completely equipped restaurant.

Q. (By Mr. McCutcheon): How much did you pay to go in business with Mr. Humphries?

A. It was never discussed.

Q. How much of an inventory was maintained from the time you went in business with Mr. Humphries until the termination of your business?

A. I don't think I am qualified to answer that,

(Testimony of Marvin Campbell.)

it was quite a large stock we had on hand but the actual valuation of it I am not too familiar with it.

Q. Now, do you recall an incident with reference to moose meat? [453]

A. Yes, I do.

Q. And do you recall Mr. Humphries' arrest?

A. Yes.

Q. Were you present at that time?

A. Yes, I was.

Q. What time of the day was it?

A. It was about eight-nine o'clock at night.

Q. And what had you been doing prior to that time that day? On the same day what had you been doing prior to that time of his arrest?

A. The thirty minutes before that?

Q. No, I mean the day time?

A. That afternoon we had been working on our books and at the end of the March accounts getting them straightened out.

Q. And by "we," who do you mean?

A. Mr. Humphries, our bookkeepers and myself.

Q. And had you been with him all the time?

A. Yes.

Q. And what time was he arrested?

A. About eight o'clock at night.

Q. And where was this?

A. Out in back of the Panhandle.

Q. And were you with Mr. Humphries then?

A. Yes.

Q. Where were you going? [454]

(Testimony of Marvin Campbell.)

A. We were just in the process of getting into our car—Mr. Humphries' car, rather, to go out to talk to our bookkeeper again.

Q. And will you tell what happened in detail?

A. We went out the back door. Just as we got out there the City Police Patrol Wagon was blocking the driveway and two policemen and Joe Blackard jumped out with guns and held us there.

Q. Did Joe Blackard have a gun?

A. Yes.

Q. Did he point it at you? A. Yes.

Q. Did you hold your hands in the air?

A. Yes.

Q. For how long a period?

A. 30 minutes or so.

Q. Then what happened?

A. Then after awhile Oscar Larsen, apparently the Game Official, came up.

Q. What did he do?

A. Blackard ran over and said there was some moose meat in the back of the car and threw the trunk open.

Q. Now, did you ever hear of any moose meat prior to that time? A. No. [455]

Q. Was that the first you had seen that moose meat? A. Yes.

Q. And then what happened?

A. Then there was some discussion there and they finally took Mr. Humphries and myself down to the Game Commission office.

(Testimony of Marvin Campbell.)

Q. Had you ever seen card games conducted on the premises? A. Yes.

Q. Where were they conducted?

A. In the back end. The first game was conducted between our storeroom and the end of our counter.

Q. And what period of time was that with reference to when the business was open, when did the card games first appear there?

A. They started in within a few days afterwards.

Q. And did they continue? A. Yes.

Mr. Cottis: Object to the leading question, Your Honor.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): What period of time did the card games operate there?

A. They operated there until sometime before we went to trial.

Q. What effect, if any, did this have on your business?

A. It didn't do it much good.

Q. What effect, if any, did it have?

A. It cut down the day's receipts. [456]

Q. And how much did it cut down the day's receipts?

A. Oh, it is pretty hard to say right now, it probably cut it down \$25-\$50 a day.

Q. And who was running the card games?

(Testimony of Marvin Campbell.)

A. The first fellow that ran it, the only identification we ever had with his name was Red. He is a known professional gambler around here.

Q. And did anyone else operate the card games?

A. Yes, he didn't last very long and then a man by the name of Crest took over.

Q. Was he operating the game for Mr. Blackard? A. Yes.

Mr. Cottis: Object, unless the witness knows of his own knowledge.

Q. (By Mr. McCutcheon): Do you know of your own knowledge? A. Yes.

Q. That he was operating the games for Mr. Blackard?

A. He was operating under the general house rule that govern these games that he was working under percentage.

Q. And what games were they playing?

Mr. Cottis: Ask that the answer be stricken as not responsive.

The Court: Motion is denied. [457]

Q. (By Mr. McCutcheon): What kind of games were they playing?

A. Dealer told me one night he was playing knock-poker.

Mr. Cottis: Object, if it is based on hearsay.

The Court: Objection is overruled.

Q. (By Mr. McCutcheon): Were the chips worth money? A. Yes.

Q. Where were they worth money?

(Testimony of Marvin Campbell.)

A. Over the bar.

Q. And what could you buy with the chips?

A. They bought a few beers over the bar, I believe.

Q. Did you ever see anyone buy drinks with the chips? A. Yes.

Q. Frequently?

A. No, there wasn't too much drink bought.

Q. How else do you know that the chips were of value?

A. You don't run a game for nothing.

Mr. McCutcheon: May we have a short recess, Your Honor?

The Court: Court will stand in recess for 10 minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present and counsel may proceed with the examination.

Q. (By Mr. McCutcheon): Were you present at the opening of the restaurant, Mr. Campbell?

A. Yes, I was.

Q. And were you employed with Mr. Humphries prior to going in business with him?

A. Yes, I worked with him most of the time he was in business.

Q. And you became a partner of his when he smashed his finger, is that correct? A. Yes.

Q. Now, do you recall what the average daily

(Testimony of Marvin Campbell.)

take of the business was during the period of time you were his partner?

Mr. Cottis: I object, Your Honor, he has already testified that he did not know.

The Court: If the witness knows he may answer, otherwise he should say he doesn't know.

Q. (By Mr. McCutcheon): Mr. Campbell, did I ask you that question earlier?

A. Not that I remember.

The Court: I do not recall the question, but my memory isn't controlling on the jury and the jury may remember whether the question was asked. At any rate it may be answered if the witness knows.

Mr. McCutcheon: I wouldn't want the impression left with the jury that he had been asked that question and testified that he didn't know. [459]

The Court: It isn't important enough to argue about, let's go ahead. Many questions are asked two and sometimes three or four or five or six times.

Q. (By Mr. McCutcheon): Do you know what the average daily take of the business was during the time you were in business with Mr. Humphries?

A. We did, I think, somewhere between \$150 and \$175 a day.

Q. That was gross income, was it?

A. Yes.

Q. Now, did you under your contract pay Mr. Blackard any money?

(Testimony of Marvin Campbell.)

A. No, he was never paid.

Q. Why not?

A. Well, there was discussion about the redecoration of the place between Mr. Humphries and Mr. Blackard and it was never ironed out.

Q. Now did Blackard pay your mother the rent following the lawsuit?

A. After I filed papers on him for eviction she never received any rent.

Mr. Cottis: Well, I object, Your Honor, it is irrelevant and any knowledge he would have would be hearsay.

The Court: I don't see the relevancy of what happened after the papers were served as respects rents.

Mr. McCutcheon: Only to show the feeling that existed [460] at the time, Your Honor, that was the time that Mr. Blackard served a notice on Mr. Humphries and Mr. Campbell and the question was for the purpose of showing what his attitude was at that time. Whether Blackard paid any rent for the place to Mrs. Campbell, I think, is a collateral matter entirely.

Q. When did you close the business down?

A. Somewhere around the 22nd of May.

Q. And why did you close it down?

A. Feelings just got too hot and business just disintegrated so that we just decided to just close it down.

Q. Now, what difficulties did you encounter?

(Testimony of Marvin Campbell.)

A. We had lots. Feelings were just running too high.

Q. Feelings between whom?

A. Between Blackard and Phillips and myself and Mr. Humphries.

Q. What, if anything, did Mr. Blackard do that affected your business?

A. Well, he tried to ruin the credit rating.

Q. How did he do that?

Mr. Cottis: I object, Your Honor, unless the time is pinned down prior to April 15th.

The Court: Overruled.

The Witness: Our creditors were all informed that we were going out of business—we were going broke.

Mr. Cottis: I object unless the witness knows it of his own knowledge and not of hearsay. [461]

The Witness: No, sir.

Q. (By Mr. McCutcheon): What was your last statement, Mr. Campbell? How many hours a day did you operate when you first went in with Mr. Humphries?

A. Supposed to be a 24-hour house.

Q. And did you always operate it 24 hours?

A. No, we didn't.

Q. Why not?

A. Because after we went home at night Mr. Blackard would close the place down and lock it up.

Q. And did he do this more than once?

A. Yes, on several occasions.

(Testimony of Marvin Campbell.)

Q. And what did you do?

A. Well, we would go down in the morning and when we would get down there ten or eleven o'clock in the morning and find the place all closed up and then try—and reopen it again.

Q. Were you able to serve breakfast?

A. No.

Mr. Cottis: Object to the leading question.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): How many meals a day did you serve?

A. If we would have operated the place the way it should have been operated we would serve all the meals ordinarily [462] served during the day.

Q. What meals are you referring to?

A. Breakfast, lunch and supper and late dinners and lunches.

Q. After Mr. Blackard closed the front door, how many meals did you serve then?

Mr. Cottis: Your Honor, I object, Mr. Campbell did not testify so far as I recall that Blackard had closed the front door.

Q. (By Mr. McCutcheon): Did Mr. Blackard at any time lock the front door? A. Yes.

Mr. Cottis: Object to it as leading.

The Court: Overruled.

The Witness: He did, yes.

Q. (By Mr. McCutcheon): When?

A. On several occasions.

(Testimony of Marvin Campbell.)

Q. On more than one occasion? A. Yes.

Q. And after he did this how many hours a day did you stay open?

A. Well, we opened up ten or eleven in the morning and that would cut out most of the lunch because it couldn't be brought up in time for the noon meals.

Q. And what other meals couldn't you serve?

A. We couldn't serve breakfast.

Q. Did this have any effect on your business?

A. Yes, it ruined it.

Q. And is that the reason you finally closed down? A. Yes.

Mr. Cottis: Object as leading, Your Honor.

The Court: Sustained.

Q. (By Mr. McCutcheon): Did you ever attempt to sell the business? A. Yes.

Q. To whom? A. A——

Mr. Cottis: Objection as leading.

The Court: Overruled.

Q. (By Mr. McCutcheon): To whom?

A. A man that went by the name of Slim Guyron.

Q. And did he make you an offer for the business? A. Yes.

Q. How much was it?

A. He offered \$9,000 plus inventory, as I remember it.

Q. And where was that offer made?

A. It was made with—he talked at the Panhandle and Stanley McCutcheon's office.

(Testimony of Marvin Campbell.)

Q. And was that sale ever consummated? [464]

A. No, it wasn't.

Q. Why not?

A. Because he stipulated that he wanted to get approval of all parties in this matter.

Q. And did he get approval of all parties?

A. No, he couldn't.

Q. Who didn't he get approval of?

A. Joe Blackard wouldn't approve.

Q. Now, you heard the testimony with reference to some spoiled meat, were you present when that incident took place? A. Yes.

Q. Will you testify as to what you saw and heard and what occurred?

A. Well, we went down there on several occasions that day and one of them we went through there and everything like was apparently in order.

Q. Was this after the restaurant had been closed?

A. Yes, closed and locked up. Everything was in order—the meat was in the locker and everything was in order—and then we went back a few hours later and they had a small pickup truck out in back and they had a lot of meat and stuff slung on it.

Q. Who did?

A. Mr. Blackard and Mr. Jack Guard.

Q. And what did you do? [465]

A. Well, the Marshal came down and talked to them and they—when we went back we found they

(Testimony of Marvin Campbell.)

had put it back in the storeroom but not in the freezing compartments where it belonged.

Q. And where did they put the meat specifically?

A. Well, it was put around on the counters and in the butchering room——

Q. Excuse me——

A. ——and different spots.

Q. Where was the meat prior to its removal, prior to the time they put it on the truck where had the meat been?

A. It had been in the big box—meat box—out in the back part reach-in box.

Q. Was it frozen?

A. Part of it was and part of it was fresh airborne meat.

Q. What was the condition of the meats at that time?

A. It was all in good condition as it had all been brought in from Seattle.

Q. How much meat was there?

A. I don't really know, there was quite a large amount.

Q. What was the condition of the meat after the truck incident?

A. Well, it got dirt on it and it got exposed to the air and one thing and another, it didn't do it any good.

Q. Where did Mr. Blackard put the meat when he took it off the truck? [466]

(Testimony of Marvin Campbell.)

A. It was thrown around inside the storeroom.

Q. Do you recall how long it remained there?

A. No, I don't, I think an hour or two.

Q. Was the storeroom—did Dr. Moon subsequently pay you a visit there at the premises?

A. Yes, after this episode, Dr. Moon showed up on the scene and condemned this meat.

Q. Why?

A. Said it wasn't sanitary and gave us a long speech about that we didn't have any business having anything like that in a restaurant.

Q. And was the restaurant open or closed at that time? A. Restaurant had been closed.

Q. How long had the restaurant been closed?

A. For several days.

Q. Now, do you remember a coal chute in the premises?

A. There was at one time a coal chute.

Q. Now, you heard Mr. Castlio's testimony this afternoon that he went down a coal chute to——

Mr. Cottis: Object to counsel testifying as to what the witness might have heard.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): What was the date the restaurant closed?

A. We closed it up about the 22nd of May. [467]

Q. When did you open the restaurant, approximately?

A. It was open the 6th of March, the whole place was.

(Testimony of Marvin Campbell.)

Q. Was there a coal chute leading into a store-room at that time?

A. The place where it had been during the course of the remodeling they laid a new floor over it.

Q. And did it seal the coal chute off?

A. Yes.

Q. And was the coal chute sealed off at the time you closed the restaurant? A. Yes.

Q. Was it possible for a person to go down the coal chute?

A. I don't think it would be very easy to go down there.

Q. Was it sealed over? A. Yes.

Q. Well, you would have to tear up the material that sealed it over, would you not? A. Yes.

Mr. Cottis: Object to the form of question, Your Honor.

The Court: Objection is sustained. Counsel should remember that he isn't testifying.

Mr. McCutcheon: I will remember, Your Honor.

Q. What happened to the premises?

A. They burned up.

Q. And on what date? [468]

A. I think it was about the 21st of December, something like that. I know it was a Tuesday before Christmas, I remember that.

Q. Did you inspect the premises after the fire?

A. After I was assured that the Fire Inspector no longer had any interest in the place I went in there.

(Testimony of Marvin Campbell.)

Q. Was there anything of salvage left?

A. No, there was nothing of any value.

Q. What did you find, if anything?

A. Well, I went in there and started to clear the place out.

Mr. Cottis: Your Honor, I object to the irrelevant and collateral nature of all this.

The Court: I don't see the point. I don't see the relevancy of this. What is sought to be disclosed by this testimony, Mr. McCutcheon?

Mr. McCutcheon: That some of the articles that were left there were sold by Mr. Blackard and they didn't belong to him, that is what I hope to show.

The Court: All right, go ahead.

Q. (By Mr. McCutcheon): Now, was there anything of value that survived the fire?

A. Yes, we went in and chopped out the bar and it seemed to be in pretty good shape.

Q. What happened to it?

A. It was later sold by Joe Sheen and Joe Blackard and Glen [469] Phillips.

Mr. Cottis: I object unless the witness knows of his own knowledge.

Q. (By Mr. McCutcheon): Do you know of your own knowledge? A. Yes.

Q. How did you know?

A. Because it has come out—it has been acknowledged by those people in letters and one thing and another.

Mr. Cottis: Then his testimony is not the best evidence, Your Honor, and I object on that ground.

(Testimony of Marvin Campbell.)

The Court: Objection is sustained and the jury will disregard the testimony.

Q. (By Mr. McCutcheon): Now, how do you know of your own knowledge that the bar was sold?

A. Because George Gramuth had the bar in the Anchorage Grill and he admitted that he had bought it from these people.

Mr. Cottis: Objection, Your Honor.

Q. (By Mr. McCutcheon): Was Mr. Blackard present when he admitted it?

A. No, it was in Harry's office.

Mr. Cottis: Objection to all this.

The Court: Yes, the jury is instructed to disregard the testimony because the witness isn't testifying from his own [470] personal knowledge but basing his statement upon what someone else told him and that under the circumstances cannot be competent evidence.

Mr. McCutcheon: I thought Mr. Blackard was present at the time, Your Honor, or I wouldn't have brought it out in that manner.

Mr. Cottis: I object to counsel's statement, it is prejudicial.

The Court: Overruled.

Q. (By Mr. McCutcheon): Was Mr. Blackard ever present during any discussions in connection with the bar?

A. No, Mr. Blackard never came into my sight up until the time of this trial.

Mr. Cottis: I never caught the answer, will you read it, Mr. Casey?

(Testimony of Marvin Campbell.)

(Answer read.)

Q. (By Mr. McCutcheon): I hand you plaintiff's Exhibit No. 11, tell me what you see in that?

A. It shows the general view.

The Court: Better hold it up before the jury so that they may see what you are looking at.

Q. (By Mr. McCutcheon): Continue to hold it up, if you will, and then answer my [471] questions. Do you know any of the parties in the photograph?

A. Yes, it is—Mr. Tibbitt is in this picture, Mr. Blackard and myself.

Q. And will you point them out, please?

A. This is Mr. Tibbitt.

Q. And who else?

A. Joe blackard is in there.

Q. And is there anyone else in the photograph that you recognize? A. Glen Phillips.

Q. Anyone else?

A. There is Mrs. Humphries and her children are sitting here.

Q. Now, does that photograph show the liquor store premises?

A. Yes, it shows the back view of it.

Q. Now, will you hold the photograph up and point it out to the jury, please?

A. This is the back of the liquor store.

Q. Now, were the restaurant premises visible from the street? A. Not very easily.

Q. Why not?

(Testimony of Marvin Campbell.)

A. Because they were directly behind the liquor store.

Q. Now, how many stools were there at the counter after it was remodeled?

A. I believe there are 16 .

Q. Are they shown in the photograph? [472]

A. Yes.

The Court: I think we may as well suspend at this time. You may step down, Mr. Campbell and return the photograph to the Clerk.

The trial will be continued until ten o'clock tomorrow morning and, ladies and gentlemen, under the law I am again obliged to remind you that you must not discuss the case among yourselves or with others or listen to any conversation about it, neither should you form or express an opinion about it until it is finally submitted to you.

You may now retire.

(Whereupon, at 5:00 p.m., Monday, June 27, 1949, the trial was recessed until 10:00 o'clock, a.m., Tuesday, June 28, 1949.) [473]

Tuesday, June 28, 1949

The Court: Clerk may call the roll of the jurors.

(Juror's names were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Another witness may be called.

Mr. McCutcheon: I believe Mr. Campbell was on the stand, your Honor.

MARVIN CAMPBELL

called as a witness for the plaintiffs, having previously been duly sworn, resumed the stand and testified as follows:

Further Direct Examination

By Mr. McCutcheon:

Q. Mr. Campbell I hand you Plaintiff's Exhibit 9 for identification and ask you to tell me what it is?

A. It is a credit slip from the Bank of Alaska.

Q. And who is it signed by?

A. It is signed by James Gardner.

Q. And is there a date on it?

A. Yes, it is March 12, 1948.

Q. And who is the credit slip directed to?

A. It is made out to me.

Q. And what does it represent?

A. It represents the repayment on a loan I made.

Mr. Cottis: Your Honor, I object to that answer. The memo speaks for itself. [476]

The Court: Overruled.

Q. (By Mr. McCutcheon): What does the credit memorandum represent?

The Court: It has already been answered.

Q. (By Mr. McCutcheon): Have you completed your answer to that question, Mr. Campbell?

A. It is a repayment of a note that I had. I borrowed some money.

Q. When did you borrow the money?

A. I borrowed it, I believe, on about the 6th of March.

(Testimony of Marvin Campbell.)

Q. And for what purpose?

A. I borrowed it for Mr. Humphries.

Q. And for what purpose?

A. He used——

Mr. Cottis: Your Honor, I object unless the witness knows of his own knowledge.

The Court: Overruled.

The Witness: He used it to repay Joe Blackard.

Mr. McCutcheon: I offer it.

The Court: It may be received as Plaintiff's Exhibit No. 9 and may be read to the jury.

Mr. McCutcheon: It was 9 for identification.

The Court: I see, it was marked for identification before Plaintiff's Exhibit No. 9. [477]

Mr. McCutcheon: "Date 3-12-48. Credit Marvin Campbell. Loan Payment \$300. Note No. 12722. Interest 3-12-48. 53c. Bank of Alaska. By James Gardner. Total \$300.53."

Your witness, Mr. Cottis.

Cross-Examination

By Mr. Cottis:

Q. Mr. Campbell, where is the note that that repaid?

A. I don't exactly know. I had it among my papers but I don't know exactly where it is right now.

Q. It was not burned in Mr. Humphries' house fire?

A. No, it is my personal papers.

Q. Can you find it and produce it?

(Testimony of Marvin Campbell.)

A. It might be at home in Seattle. I don't know where it is exactly. I had that with me but I don't know where the note is right now.

Q. Are you sure you borrowed the money on March 6th?

A. Yes, I believe that is the date.

Q. Could it have been March 4th?

A. No, it was a five-day note as far as I remember.

Q. At what interest rate?

A. Regular bank rate, I don't know, I think it was eight per cent or something.

Q. The total amount of the loan was \$300?

A. Yes.

Q. And did you not testify that Mr. Humphries used that [478] money to repay Joe Blackard part of what he owed him? How do you know that?

A. I watched the transaction.

Q. Will you tell me what you saw?

A. Well, I gave the money to Mr. Humphries.

Q. Where was this?

A. I believe in the Panhandle.

Q. And on about what day?

A. When we opened.

Q. That was March 8, 1948? A. Yes.

Q. And you had just acquired the money from the bank, had you? A. Yes.

Q. In what form was it—cash or cashier's check? A. Cash.

Q. All right, go on with what happened?

(Testimony of Marvin Campbell.)

A. Well, he was working around and he had it taken over to the bar and given it to Mr. Blackard.

Q. Who else was present?

A. I don't really remember.

Q. You were present? A. Yes.

Q. Mr. Humphries was present? A. Yes.

Q. Mr. Blackard was present? A. Yes.

Q. Was Mr. Phillips present?

A. I believe he was working around there.

Q. Was Mr. Starns present?

A. No, I don't think so, that was during the opening.

Q. What time of day was it?

A. Oh, it was somewhere around noon, I believe.

Q. Where was it that you gave Mr. Humphries the money? A. In the restaurant.

Q. In back of the counter? A. Yes.

Q. And then did you stay in back of the counter or did you accompany Mr. Humphries when he went over to talk to Blackard?

A. No, I was working around the counter there, too.

Q. And you stayed there, too? A. Yes.

Q. And where was Mr. Blackard?

A. He was working back of his counter, I remember.

Q. That is, in back of the bar? A. Yes.

Q. And you saw Mr. Humphries go over to Mr. Blackard?

A. Either he went over or he sent somebody over with the money.

(Testimony of Marvin Campbell.)

Q. Do you recall whether he went over or whether he sent [480] somebody over?

A. No, it is too long ago.

Q. Do you recall who was there he might have sent? A. No, I don't.

Q. Well, do you remember that either Humphries or somebody on his behalf went over behind the bar with the money? A. Yes.

Q. And did you see the money passed to Mr. Blackard's hands? A. Yes.

Q. How much altogether?

A. I don't really know how much it was.

Q. Did the entire \$300 change hands?

A. Yes, he borrowed \$300 from me and he got some other money besides that and I don't know what exactly how much he gave to Mr. Blackard.

Q. Did you give the \$300 to Mr. Humphries or to this man he might have sent over? A. Yes.

Q. Which one?

A. I think I gave it to Mr. Humphries first.

Q. And then you saw Mr. Humphries give it to somebody else? A. Yes.

Q. And then you saw somebody else give it to Mr. Blackard? A. Yes.

Q. And the money was in cash? [481]

A. Yes. Yes, in cash.

Q. Were the bills all of one denomination?

A. I don't really remember what denomination they were.

Q. Were they in an envelope? A. No.

(Testimony of Marvin Campbell.)

Q. They were just open cash? A. Yes.

Q. Now, what time of day was this about?

A. Around noon.

Q. And you had just returned from the bank?

A. Yes.

Q. You are sure that Mr. Humphries was there?

A. Yes.

Q. Had Mr. Humphries been there that morning? A. Yes, he was around there.

Q. Did you not hear Mr. Humphries testify that he did not appear on opening day until after noon?

A. We were around there at various times during the course of that date.

Q. He was there during the morning?

A. Yes.

Q. Now, you don't remember whether you gave the money to Humphries or to this third person?

A. I handed it to Humphries as far as I know.

Q. And then you saw him hand it right over to the third [482] person? A. Yes.

Q. Did he put it in his pocket at all?

A. Not that I know of.

Q. To the best of your memory you handed him the open bills not in an envelope and he passed them right on to the third person. A. Yes.

Q. Did you hear any conversation between Mr. Humphries and the third person?

A. Yes, he told him to take it over to Joe in the bar and give it to him.

Q. But was this third person an employee of

(Testimony of Marvin Campbell.)

Humphries? A. I don't remember.

Q. Was he a customer?

A. No, somebody working around there.

Q. Carpenter or electrician or something like that?

A. No, somebody that was working around there during the course of the opening.

Q. That is, somebody who was working for Mr. Humphries? A. Yes, I believe it was.

Q. Was it a male or a female?

A. It was a man.

Q. Well, you were working for Mr. Humphries at that time, were you not? [483]

A. No, I wasn't.

Q. When did you start working for Mr. Humphries?

A. Oh, several days after the place opened I went to work.

Q. How did you happen to be on the premises at the time of this payment?

A. I was helping clean up both the bar and the restaurant and helping them get open.

Q. Now you are sure that the man to whom Mr. Humphries passed this money gave it to Blackard and not to Phillips?

A. No, it was given to Blackard.

Q. You saw the money actually pass into Blackard's hands? A. Yes.

Q. Did you hear any conversation between Humphries' employee and Blackard at that time?

(Testimony of Marvin Campbell.)

A. No, I wasn't paying any attention to it.

Q. But you did see the actual bills pass into Mr. Blackard's hands? A. Yes.

Q. Now, when did Mr. Humphries add some more money to this \$300?

A. About the same time.

Q. At the time that you handed him the \$300 that he produced some more money?

A. Yes, he got some other money besides that.

Q. Where did he get that from, from his pocket?

A. No, he loaned some other money besides that \$300.

Q. Where did he produce it physically from at that time?

A. That is pretty hard for me to answer

Q. Well, you are testifying, are you not, that you are sure that Mr. Blackard was re-paid on that day in full.

A. I don't know how much he was to be paid but I know that he got some money; I believe he got all of this \$300.

Q. You believe that he got all of the \$300?

A. Yes.

Q. Did he get any additional money?

A. I believe he did; how much I don't know.

Q. Well, you are sure that he got all of the \$300 because that \$300 in cash never left your sight, isn't that so? A. Yes.

Q. You never lost sight of that \$300?

A. No, I watched the transaction.

(Testimony of Marvin Campbell.)

Q. How high was the bar there?

A. Well, this took place in the end of the bar; there was an opening at the end of the bar.

Q. Was Blackard standing behind the bar?

A. He walked down to the end of the bar as I remember it.

Q. Did Humphries call him down to the end of the bar? A. Yes, I believe so.

Q. What was that conversation as nearly as you can remember it?

A. He was called down there about this transaction. [485]

Q. Can you remember the words that Humphries used? A. No, I don't even know.

Q. Do you remember who was talking with Blackard? A. No, I don't.

Q. Could you hear the conversation?

A. Why, I watched the transaction and the conversation. I know exactly how close I was to it.

Q. Could you hear any of the words that were spoken? A. I don't really remember.

Q. Did any pieces of paper change hands between Humphries' emissary and Blackard?

A. Yes, the money did.

Q. Anything else? A. No.

Q. Just money? Now, the money that was added to your \$300 what form was that in—cash, checks? A. It was all cash.

Q. And you don't recall where Humphries produced that other money from?

(Testimony of Marvin Campbell.)

A. No, I don't.

Q. But you are sure that he did produce that other money? A. Yes.

Q. You just don't know how much it was?

A. No, I couldn't swear to how much it was.

Q. And nobody that you can remember was present besides yourself, Humphries, Blackard and Phillips, is that right? [486]

A. There was a lot of people around there but I don't think they were paying much attention to it—a lot of people in there then.

Q. What did Blackard do with the money?

A. I didn't watch him put it in his pocket, I suppose.

Q. He had a safe right there, didn't he?

A. Yes.

Q. Did he open that?

A. I didn't see him open any safe.

Q. Do you know that he did not open the safe?

A. I wasn't watching him after that.

Q. All that you were watching him of the only period of time that you were watching him was when he was receiving this money from Humphries messenger? A. Yes, watched the transaction.

Q. And you don't recall who the messenger was?

A. No.

Q. But you don't think now it was Humphries himself who paid that money?

A. No, I don't think it was. He was making the payment.

(Testimony of Marvin Campbell.)

Q. How do you know what the money was being paid for?

A. I didn't know what it was being paid for.

Q. You did not know? A. No.

Q. Did you not testify on direct examination to Mr. McCutcheon [487] that that was a repayment of a loan that Humphries owed Blackard?

Mr. McCutcheon: May I hear that question again?

Mr. Cottis: Read the question.

(Question read.)

The Witness: I remember I testified in that paper was a repayment of a loan that I made with the bank.

Q. (By Mr. Cottis): Did you not also testify to the purpose for which that money was used? Can you speak up just a little bit, Marvin?

A. It was used—it was given to Blackard.

Q. Do you know what it was given to Blackard for?

A. Some transaction between him and Humphries.

Q. Do you know what transaction?

A. I believe it was some kind of a repayment of some sort.

Q. All right, what makes you think that?

A. People, from what they told me around there.

Q. Do you have any other knowledge besides what you were told? A. No.

Mr. Cottis: Your Honor, I ask that his testimony on this subject be stricken.

(Testimony of Marvin Campbell.)

The Court: Motion is denied. You refer to all of this subject of getting money from the bank and and given it to, as he says, to Humphries, seeing it given to Blackard? Motion is denied. [488]

Q. (By Mr. Cottis): Mr. Campbell, where did you get Mrs. Cavin's account book?

A. After the fire in the Panhandle and after the fire investigators were through and I knew that they were through I went into the Panhandle and went through the wreckage. I dug up several things.

Q. What else did you dig up?

A. I dug up checks and various papers that were lying around there, nobody else was interested in them so I picked them up.

Q. When was this? Can you speak up just a little bit more?

A. It was in January.

Q. Was anybody with you at the time?

A. Yes.

Q. Who was with you?

A. My uncle was with me and I had another fellow that was helping me.

Q. How long did you spend probing through the wreckage?

A. We cleaned out a lot of the wreckage because the City was hollering about the wreckage was going to fall down, so we went in and cleaned out a lot of stuff in there. We spent a couple of days in there.

Q.. The three of you?

A. Yes.

(Testimony of Marvin Campbell.)

Q. Now, when you found Mrs. Cavin's book did you know what it was?

A. No, it was all frozen up, all this stuff, and I just took [489] it home.

Q. Home to Seattle?

A. No, to the place where I was staying.

Q. And when did you discover what it was?

A. Well, after it thawed out I looked at it and it seemed to be an account book so I just hung on to it.

Q. Did you ever notify Mrs. Cavin that you had it?

A. I never even knew who Mrs. Cavin was until I came up here this last time.

Q. Until you came up here this last time?

A. Yes, and didn't seem to be such a person.

Q. You kept the book in your own custody all that time?

A. Yes, it was at my home in Seattle.

Q. It was at your home in Seattle?

A. Yes.

Q. And when did you bring it up here?

A. When I came up here the last time.

Q. When was that?

A. We left home the 2nd of June. I think we got here about the 5th or something like that.

Q. Where do you reside, Mr. Campbell, now?

A. Council Grove, Kansas.

Q. Did you have a book at Council Grove, Kansas?

A. No, it was in Seattle in my drawer.

(Testimony of Marvin Campbell.)

Q. When did you realize that the book belonged to Mrs. Cavin? [490]

A. All I knew about it was the names on it said Carl and Dorothy Cavin on some of the papers and I made inquiries around town and nobody seemed to know who they were or anything else.

Q. Until when? When did you find out who they were?

A. When I came up here the last time.

Q. How long ago was that that you found out who they were? A. Oh, maybe 10 days ago.

Q. At that time did you make any effort to return the book to Mrs. Cavin?

A. I see no reason why I should.

Q. You consider that the book belongs to you?

A. As far as I am concerned it is, nobody seemed to want it.

Q. Well, nobody knew you had it, isn't that so?

A. And I didn't know who Mrs. Cavin was either.

Q. But 10 days ago did you not find out who she was? A. Yes.

Q. And you made no effort to return the book?

A. No.

Q. Mr. Campbell, what about Joe Blackard's check book, where did you find that?

A. It was laying in a heap of snow and rubble and one thing and another with loose checks.

Q. Did you find that at the same time?

A. During the course of our probings I found

(Testimony of Marvin Campbell.)

some of his checks and one thing and another laying around there. [491]

Q. Some of his checks or a check book?

A. Some of his checks. They are in loose form.

Q. Now, where are they now?

A. Oh, some of them are here and I don't know where the rest went to.

Q. You don't know what you did with the rest of them? A. No, I don't.

Q. Did you take them to Seattle?

A. I believe I took some of the stuff to Seattle.

Q. When did you realize that those checks were Joe Blackard's?

A. Why I seen that on them.

Q. That is, immediately when you found them you realized that?

A. No, they were all frozen up, all that stuff.

Q. How long was it before you realized that they were Joe Blackard's?

A. Oh, several days.

Q. More than a week? A. No.

Q. Now did you ever make any effort to return them to Joe?

A. No, and Joe Blackard never made any effort to contact me after the fire either or my mother.

Q. Now, Mr. Campbell, how long were you operating with Mr. Humphries in that restaurant as a partner?

A. After he cut off his finger I took it over and helped [492] operate it from then on.

(Testimony of Marvin Campbell.)

Q. Can you place it more or less by month and day?

A. No, I wasn't paying much attention to the calendar.

Q. Do you know what month it was?

A. No, I don't, it was probably the latter part of March or the first part of April.

Q. When you went in with Mr. Humphries as a partner the restaurant had been operating for several weeks then? A. Yes.

Q. And prior to the time that you went in as a partner you had worked as an employee for Mr. Humphries?

A. Yes, worked as a dishwasher.

Q. But you were not an employee of Mr. Humphries at the time the restaurant opened?

A. No.

Q. And how long do you think it was after the restaurant opened before you became an employee of his? A. I think about a week.

Q. How much did he pay you as an employee?

A. Standard rate.

Q. And how much was that?

A. \$9.00 a shift.

Q. Had you been around the restaurant before you accepted employment with Mr. Humphries?

A. Yes, I had been around the Panhandle. [493]

Q. Constantly?

A. More or less from the time I got in town.

Q. Did you ever see a Federal Restaurant License on the premises?

(Testimony of Marvin Campbell.)

A. I don't know what he had there.

Q. Did you ever see one that you know of?

Mr. McCutcheon: Can you speak up a little bit?

The Witness: I never looked for one.

Q. (By Mr. Cottis): Did you ever see a Territorial Restaurant License?

A. I never saw any licenses.

Q. You never saw a City License either?

A. I don't know what he had there. I didn't pay any attention to it.

Q. After you went in partnership with Mr. Humphries did you examine the firm's books?

A. The books were kept by an accountant and I never looked at them very close at any time.

Q. And who was the accountant?

A. Harry Gottschaulk.

Q. Now, Mr. Campbell, did you hear Mr. Humphries testify that the gross business during May was slightly over \$3,000? A. Yes.

Q. And did you hear him testify that the gross business during April was slightly over \$3,000?

A. I wouldn't know how much it was in April.

Q. Do you know how much it was in March?

A. Yes.

Q. How much was it?

A. We had a statement, I think it ran \$3,300, something like that.

Q. Did you not testify to Mr. McCutcheon that the business was grossing from \$150 to \$175 a day?

A. Something like that.

(Testimony of Marvin Campbell.)

Q. Can you reconcile your figures with the \$3,000 monthly figures?

A. Restaurant business goes up and down. I believe that is pretty close to what we were doing.

Q. I am sorry, I couldn't hear your answer?

A. I think that is pretty close to what we were doing.

Q. What is?

A. \$150 to \$175 a day.

Q. Now, did not an accountant arrive at this figure of \$3,300 for March?

A. Yes, taken off the tapes.

Q. Do you think he was incorrect? A. No.

Q. And the business for May was something over \$3,000? A. Yes.

Q. And you don't know what the business for April was? [495]

A. No, I don't.

Q. You only operated 21 days in May, did you not?

A. Yes, wasn't business then better in May than it was in March?

A. No, I don't believe so.

Q. Well, now, during March did you not testify that the gross receipts were \$3300?

A. When you first open a business your business is generally lower than it was after you have been in business for a while.

Q. Well, then, it was lower in March was it than it was in May?

(Testimony of Marvin Campbell.)

A. No, it was about the same, should have been more.

Q. And do you have any recollection at all about April? A. No, I haven't.

Q. None at all? A. No.

Q. But you were working there steadily during April? A. Yes.

Q. And during April were you not a partner with Mr. Humphries? A. Yes.

Q. Are you and Mr. Humphries still partners? A. Yes.

Q. Were you ever in the premises when your father operated them? A. Yes.

Q. Did he have any card tables? A. Yes.

Mr. McCutcheon: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Cottis): Were you ever in the premises when Tibbitt and Hardy were operating?

A. Yes.

Q. Did they have—ever have any card tables while they were operating in there?

A. I never seen any.

Q. Your mother also owned the Annex Building, did she not, next door? A. Yes.

Q. Did you ever see any card games being played in there?

Mr. McCutcheon: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection is sustained.

(Testimony of Marvin Campbell.)

Q. (By Mr. Cottis): Did you hear Mr. Humphries testify the other day that you were a bookkeeper? A. Yes, I am a bookkeeper.

Q. But you have no recollection of the April business?

A. I took the tapes and all that but I don't know exactly what it figured up to. [497]

Q. Can you approximate it?

A. No, I can't.

Q. Do you have those tapes available?

A. No, I haven't.

Q. What happened to them?

A. I haven't the slightest idea.

Q. In whose custody were they when you closed the premises in May?

A. I suppose the bookkeeper had them.

Q. That is, by bookkeeper you mean Mr. Gottschaulk? A. Yes.

Q. Have you ever asked him for them?

A. Yes, he has been asked for the records that he had and he apparently hasn't anything.

Q. Did he deny having them?

A. Just said he hasn't anything.

Q. Did he admit ever having had the tapes for April and May? A. He must have had them.

Q. Did he ever admit having them?

A. You are talking about April, aren't you?

Q. I am sorry, I can't hear you.

A. We were talking about the month of April?

Q. Did he ever admit having the tapes for the month of April?

(Testimony of Marvin Campbell.)

A. Yes, I am pretty sure that he had them at one time, I don't know——. [498]

Q. Did he ever admit having them?

A. I don't remember.

Q. Mr. Campbell, what were the liabilities of the restaurant when you went in there as a partner as nearly as you know?

A. Well, around the 10th of April we paid up all the bills that were due.

Q. And what did the bills that were due at that time aggregate, do you recall?

A. I think we paid up something like \$2500 in bills.

Q. And where did that money come from?

A. Money taken in off the restaurant.

Q. Did you advance any money to the enterprise? A. Not at that time.

Q. At what time did you advance money to the enterprise?

A. When it first opened up I loaned money and then a week or two later I think I put \$500 in it after Mr. Humphries lost his finger.

Mr. McCutcheon: Will you speak up a little bit; it is getting had to hear.

Q. (By Mr. Cottis): How much did you put in it originally when you owned it?

A. When I went into it?

Q. Yes. A. \$500.

Q. And then you put in another \$500 after Mr. Humphries hurt [499] his finger?

(Testimony of Marvin Campbell.)

A. That is about the time I went into it.

Q. Had you had any transactions with Mr. Humphries prior to that involving money?

A. Yes, and I loaned \$300.

Q. And that was on March 6th? A. Yes.

Q. Was the bar opened before the restaurant was opened? A. I think a few hours before.

Q. Couldn't have been a few days?

A. I don't believe so.

Q. You say all bills were paid off on April 10th?

A. The major portion of them were. There was one large bill that wasn't paid.

Q. And what was that?

A. A Columbia Air Cargo. There was a dispute about it and it was supposed to go back to Portland for adjustment.

Q. Was the bill to Bliss Construction paid?

A. There never was any bills to Bliss Construction as far as I know.

Mr. McCutcheon: Can you speak up a little bit, Marvin?

Q. (By Mr. Cottis): Had Mr. Bliss or the Bliss Construction Company done any work for you and Humphries?

A. Bliss Construction Company had done work for me during [500] the course of the construction. I had nothing to do with the restaurant during the course of construction.

Q. Has Bliss Construction Company done any work for Mr. Humphries that you know of?

(Testimony of Marvin Campbell.)

A. I don't know what the arrangements in the rest of the place were. I was too busy trying to keep my end of it straight.

Q. But you do know that on March 6th Humphries repaid in full to Mr. Blackard the loan or at least repaid at least \$300?

A. Yes, I am pretty sure he did.

Q. You are pretty sure he did? A. Yes.

Q. You actually saw that money change hands?

A. Yes.

Q. To Mr. Blackard? A. Yes.

Q. And you think that more money was added to it? A. Yes.

Q. And none was subtracted?

A. No, because he got some other money as far as I remember.

Q. But you can't recall where he got that other money from? A. No, I don't.

Q. From the time that you walked in there from the bank with the \$300 until it was paid to Mr. Blackard you never lost sight of that \$300?

A. No, I don't believe I did. [501]

Q. But you can't recall where any money was produced from? A. No, I can't.

Q. Did not Mr. Bliss try to collect some money from Humphries? A. I wouldn't know.

Q. Did not Mr. Bliss state that he would put a lien on the building for Humphries' bill?

A. I don't remember any such conversation.

Q. Now, has that Columbia Air Cargo bill been paid?

(Testimony of Marvin Campbell.)

A. I think they sued over it but I wasn't here at the time and I don't know what did happen to it.

Q. Did they join you as a defendant in the suit?

A. No.

Q. And despite the fact that you keep books you do not know whether that judgment has been satisfied?

A. It has never been satisfied as far as I know.

Q. During May when you and Humphries were operating the restaurant did you borrow food stuffs from Bob Cavera?

A. I never borrowed anything from him.

Q. Did Mr. Humphries ever borrow any foodstuffs that you know of?

A. I wasn't there all the time.

Q. Did you ever see him borrow any foodstuffs?

A. Not that I remember.

Q. Why was it that the premises—that the restaurant—was closed on May 22nd? [502]

A. It just got intolerable to operate it.

Q. And in what way did it become intolerable?

A. Well, they were closing it down and they were acting tough and cutting off our credit and it just got to be too much ill feelings in order to operate a business.

Q. So did you and Mr. Humphries discuss the matter? A. Yes.

Q. And you decided to close it down, did you?

A. We closed it down pending this outcome of this suit.

(Testimony of Marvin Campbell.)

Q. What bills do you recall owing on May 17th?

A. The major bills we owed were to the Jack Barett.

Q. And how much was that?

A. I don't remember the exact amount, I think it was around \$3000.

Q. Did you also owe Pierce Upholstery some money?

A. I don't know anything about that.

Q. Did you owe Herberts, Inc. some money?

A. That was before I got around there, I don't know anything about those bills.

Q. From your familiarity with the books of the firm do you recall whether you did or not owe Herberts, Inc. any money?

A. I never checked into the books to any great extent.

Q. Was the Bulk Sales Affidavit delivered to you when you became a partner in the business?

A. There was no papers transacted. [503]

Q. Did any decision of this Court entered on May 17th have anything to do with your decision to close the restaurant?

Mr. McCutcheon: Objected to as indefinite, calls for a conclusion.

The Court: Overruled.

The Witness: I don't know what this Court did on May 17th even.

Q. (By Mr. Cottis): Do you recall hearings that

(Testimony of Marvin Campbell.)

were going on in this Court during May in connection with this case?

A. They had something about an injunction or something, I believe.

Q. But do you recall the Court's decision regarding the injunction?

A. I don't believe I was in the Court room when it made its decision.

Q. You don't know what the Court's decision was?

A. No, the injunction was never given, I know that.

Q. Did that have anything to do with your's and Humphries' decision to close the restaurant?

A. It might have.

Q. Well, did it?

A. I don't know. I know that it just was impossible to operate any longer.

Q. When you became a partner of Mr. Humphries did Blackard [504] consent to the arrangement?

A. I believe that he discussed it with Mr. Humphries. It was well known to all. There didn't seem to be any objections that I know of.

Q. Did he ever give you a written consent?

A. I don't think there was ever anything in writing after the agreements they originally made.

Q. Did you hear Mr. Humphries' testimony in regard to the alleged waiver of the bond provision of that contract?

A. I believe so.

(Testimony of Marvin Campbell.)

Q. Were you present at the conversation at which that bond provision was claimed to be waived?

A. Well, I know that they had a big discussion. They laid out the liquor store on the floor.

Q. Were you present at the discussion?

Mr. McCutcheon: I don't believe the witness was through answering the question.

Mr. Cottis: He wasn't answering the question.

Mr. McCutcheon: What was the question?

Q. (By Mr. Cottis): Were you present at the discussion? A. Yes.

Q. All right, will you relate who else was present at the discussion.

A. Larry Starns was there and Joe Blackard, Vern Humphries. [505] I believe Bliss' foreman was around there and carpenters and other workmen around there.

Q. What was the name of Bliss' foreman, do you recall?

A. No, I don't, I know him by sight, that is all.

Q. And were they all present so that they could hear this discussion?

A. Yes, anybody within a block could hear it.

Q. And during that discussion did you hear any conversation with respect to the bond?

A. I know they had quite a discussion there but I don't really remember too much about it.

Q. Well, do you actually remember any discussion about the bond?

(Testimony of Marvin Campbell.)

A. I think I walked away after they seemed to be getting together because it wasn't in my department.

Q. Well, then, you did not hear any discussion about the bond?

A. No, I don't believe I did.

Q. When did you first learn that Mr. Bliss made a claim upon you or Humphries or both for construction work done for Humphries?

A. Bliss never made any claim on me for any work, any other than my own that I know of.

Q. And at this date you don't know of any bill owing to Bliss for work done in connection with the restaurant? [506]

A. I don't owe Bliss anything I know of.

Q. Do you know of any claim on Bliss' part for any bill for work done on the restaurant?

A. He never presented me with any claims.

Q. Do you have any knowledge of any such claim? A. No.

Q. None at all? A. None.

Q. To the best of your recollection when was it that the storeroom was locked?

A. I don't remember the exact date, but somewhere in the early part of April that Mr. Blackard suddenly decided we couldn't use the basement storeroom.

Q. Now, was it before or after the termination notice was served on Humphries?

A. I believe it started in before that.

(Testimony of Marvin Campbell.)

Q. In an affidavit sworn to May 6th did you not state that on the 20th of April Mr. Blackard locked the storeroom?

A. He locked the storeroom on several occasions before he finally permanently locked it.

Q. Do you recall making an affidavit to the effect that it was the 20th of April that the storeroom was locked?

Mr. McCutcheon: Just a moment, if the Court please, I would like to ask Mr. Cottis to show the affidavit if he has one to Mr. Campbell before he testifies. [507]

The Court: Affidavit must be shown to the witness.

Mr Cottis: May I be heard from, Your Honor?

The Court: Yes.

Mr. Cottis: Your Honor, this is not a third-person witness; this is a party opponent. As such I am not trying to impeach him, I am laying the foundation for introducing in evidence an admission by him as a party not as a third-person.

The Court: You are inquiring into a paper which is presumed it is assumed in your question he has signed. Under the rule the paper must be shown to the witness. If counsel wants to inquire about that he must show the paper to the witness first.

Mr. Cottis: Very well, Your Honor. May I have it marked for identification?

The Court: Yes, surely.

(Testimony of Marvin Campbell.)

The Clerk: It will be defendant's Exhibit B for identification.

Q. (By Mr. Cottis): Mr. Campbell, I show you what has been marked for identification as Defendant's Exhibit B. You may read it at your leisure to yourself.

The Court: While the witness is reading that paper we will stand in recess until seven minutes past eleven.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Q. (By Mr. Cottis): Mr. Campbell, have you read what was marked for identification as Defendant's Exhibit B?

A. Yes, the part you are talking about.

Q. You have not read it all?

A. Read—I know about what is in it.

Q. Have you read as much of it as you want to read? A. Yes.

Q. Was this your signature on here, Mr. Campbell? A. Yes.

Q. Have you read it before you signed it, did you?

A. I don't remember if I did or not. I might have left that up to my attorney.

Q. You might have signed it without reading it, is that what I understand?

A. Yes. We told him the story and then he

(Testimony of Marvin Campbell.)

wrote it up the way he wanted it. Any errors would be up to him.

Q. Even though it was a sworn affidavit you might have signed it without reading it, is that correct? A. Yes.

Q. Mr. Campbell, in going over it just now did you find anything in it that is not correct?

A. It is substantially correct; as far as I know it is [509] correct.

Q. Well, what items are not completely correct?

A. I didn't see anything there I want to change.

Q. All right, then, on the 6th of May, 1948, did you not sign a written affidavit stating that it was on the 20th of April that the defendants took possession of your storeroom?

A. It says in there on or about the 20th, I believe.

Q. What is your testimony with respect to the date now?

A. I didn't keep a calendar in my pocket at all times and I believe what I stated it was correct.

Q. And what was that?

A. That the storeroom was probably locked up before that he started this action.

Q. That is, before April 20th? A. Yes.

Q. And before April 15th when the termination notice was served?

A. I believe that the trouble started before then.

Q. Do you believe that the storeroom was locked prior to that time?

(Testimony of Marvin Campbell.)

A. It had been locked and we had got into it and then made it a little tougher each time and probably there might have been several times before it was permanently, it was locked at times.

Q. Are you testifying now that the storeroom was locked prior [510] to April 14th, 1948?

A. Yes, it was.

Q. Are you testifying it was locked prior to April 16th, 1948? A. Yes, it was.

Q. Do you have any explanation that you would care to offer about why some other date wasn't put in this affidavit?

A. You can't get everything down exact hour and minute and it says about the 20th and I believe that is close enough.

Q. This affidavit was signed on May 6th, 1948, is that correct? A. Yes, I believe so.

Q. Now, in the same affidavit did you not sign a statement stating that on the 5th of May at the hour of 1:30 in the morning of said day the defendants took possession of your restaurant and shut off the cook range? A. Yes.

Q. And what is your testimony with respect to the date now?

A. On that occasion they did that and there had been several occasions for that too.

Q. There had been several other occasions prior to that time, had there? A. Yes, I think so.

Q. Is it your testimony now that there had been occasions prior to April 16th, 1948?

(Testimony of Marvin Campbell.)

A. Well, what are we talking about—the closing of the [511] restaurant?

Q. Yes.

A. I don't remember the exact dates but I know that on several occasions he closed the place up.

Q. On several occasions prior to May 5th, 1948?

A. Yes.

Q. Do you have any explanation of why those occasions were not mentioned in this affidavit?

A. No, you would have to ask my attorney.

Q. Your memory now is certain about that state that there were occasions prior to May 5th?

A. Yes, I believe there were.

Q. You have no doubt at all about it?

A. Yes, I can remember there were several occasions when it was closed down by Mr. Blackard.

Q. Prior to May 5th, 1948? A. Yes.

Q. Now, do you recall about when you went into partnership with Mr. Humphries?

A. When he cut off his finger is when I took over the place.

Q. Can you recall about what date that was?

A. It was around the end of March—1st of April.

Q. Could it have been as late as the 7th day of April? A. No.

Q. Could it have been as early as the 21st day of March? [512]

A. I couldn't say the exact date.

(Testimony of Marvin Campbell.)

Q. Your memory is not as clear on that point as it is on these items in the affidavit, then?

A. No, all the exact dates of everything that happened I couldn't swear to, but I know that on those occasions in that affidavit did happen.

Q. And you are testifying now that there were other occasions not set forth in this affidavit?

A. Yes.

Q. That were prior to the dates mentioned in this affidavit? A. Yes.

Q. Can you recall the approximate date that any card playing stopped in the premises?

A. I think that a week or two after I served notice to quit the premises that I think they stopped the card game.

Q. Is it your recollection now that they stopped card games before or after the termination notice was served on Humphries?

A. I believe it was after that.

Q. Do you think it was before April 20th at the time they took possession of your storeroom according to this affidavit?

A. I think it was after that, somewhere between the end—somewhere in the end of April and the first part of May.

Q. And it was not before you served your notice of April 10th? A. No, it was after that. [513]

Q. Now did you not just testify that it was a week or two after that?

A. Yes, something like that.

(Testimony of Marvin Campbell.)

Q. That is, after April 10th? A. Yes.

Q. Do you think it was more than two weeks after that?

A. No, I don't think so.

Q. Then it couldn't have been the 1st part of May, is that correct?

A. I don't know the exact date.

Q. Did you hear Mr. Humphries testify that he had sent Blackard a bill for paper hanging?

A. Yes.

Q. Did you ever see that bill? A. Yes.

Q. Do you have a copy of it?

A. I haven't a copy.

Q. Do you recall what date that was made out?

A. No, I don't.

Q. Did you ever see it delivered to Mr. Blackard? A. I don't really remember.

Q. Did you ever see it dropped in a mail box?

A. I didn't do anything so I don't know.

Q. If you had seen the bill delivered to Mr. Blackard do you think you would now recall having seen it? [514]

A. It was a matter between Mr. Humphries and Mr. Blackard and I didn't really know too much about it.

Q. If you had seen the bill delivered to Mr. Blackard do you think you would recall having seen it?

A. It has been a long time ago, I don't know.

Q. Was there any discussion in your presence

(Testimony of Marvin Campbell.)

about the 6-per cent of gross receipts or the minimum of \$200 that was to be paid to Mr. Blackard each month?

A. Yes, I seen copies of that lease after I had been in there a while.

Q. Was there ever any discussion in your presence about those sums that you recall?

A. Yes.

Q. Will you tell me about when that discussion was and who was present?

A. I can't tell the exact date, I know that Blackard wanted payment of the rent and the bookkeeper made out the records—a statement of them—but there seemed to be some discussion about paper hanging in the place which didn't have anything to do with me.

Q. And who was present at the conversation, do you remember?

A. We had several conversations. Blackard came over and talked about it.

Q. To ask for his payment?

A. Yes, he asked for his payment. [515]

Q. Was any payment ever given to him that you know of? A. No.

Mr. Cottis: I offer in evidence what has been marked for identification as Defendant's Exhibit B.

The Court: Is there objection?

Mr. McCutcheon: No objection.

The Court: It may be admitted and read to the jury and marked Exhibit B.

(Testimony of Marvin Campbell.)

Mr. Cottis: It is entitled:

“In the District Court for the Territory of Alaska
Third Division
No. A-5979

“VERN HUMPHRIES and MARVIN CAMP-
BELL,

“Plaintiffs,

“vs.

“LAURENCE STARNs, JOE BLACKARD and
GLEN PHILLIPS,

“Defendants.

“Filed in the District Court, Territory of Alaska,
Third Division, May 6, 1948.

“M. E. S. BRUNELLE,

“Clerk,

“By MARY E. THAYER,

“Deputy.

“COMPLAINT

“Comes now the plaintiff and for cause of action
against the defendants complains and alleges as
follows:

I.

“That said plaintiffs are copartners engaged in
the restaurant business under the firm name and
style of Alaska Food Service, said business
being located at Anchorage, Alaska, in premises

(Testimony of Marvin Campbell.)

described [516] as the Panhandle Bar and Cafe at 314 Fourth Avenue in said city.

II.

“That said defendants purportedly hold a leasehold right in said premises by virtue of a lease from Anna K. Campbell, owner, to defendants.

III.

“That on or about the 4th day of February, 1948, at Anchorage, Alaska, defendant, Joseph Blackard, entered into a lease agreement with plaintiff, Vern Humphries, whereby defendant agreed to lease to plaintiff Vern Humphries, for the period of one year, space in said premises adequate for the operation of a restaurant business and whereby defendant, Joseph Blackard, further agreed to furnish space, light, heat and water necessary for such operation and to provide the utensils and equipment for said operation.

IV.

“That it was further agreed by the terms of said lease described in paragraph III hereof, that plaintiff would pay to defendant as rental for said premises, six per cent (6%) of the gross receipts derived from all operations of said restaurant business or the sum of two hundred dollars (\$200.00) per month, whichever might be the greater.

(Testimony of Marvin Campbell.)

V.

“That pursuant to an offer by defendant, Joseph Blackard, and acceptance by plaintiff, Vern Humphries, said agreement [517] of lease was entered into, duly signed by both parties and possession of said restaurant premises delivered to plaintiff, Vern Humphries, from defendant in accordance with the terms of said agreement.

VI.

“That relying on said agreement, plaintiff expended large sums of money in the construction of a counter upon said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business, including ranges, stools and other necessary fixtures and equipment.

VII.

“That said counter and equipment is located in the Southwest portion of said Panhandle premises. That said restaurant business was so located at the direction of defendants herein.

VIII.

“That plaintiffs are now entitled to the possession of said restaurant premises in accordance with the agreement existing between plaintiff and defendant.

IX.

“That plaintiff has performed all the things and

(Testimony of Marvin Campbell.)

conditions required by said agreement to be performed by the lessee.

X.

“That plaintiff commenced the operation of said restaurant business on or about the 6th day of March, 1948. [518]

XI.

“That since the commencement of said business, defendants have maliciously, wilfully and wantonly interfered with plaintiff’s business, resulting in great loss of profits to plaintiff.

XII.

“That on or about the 20th day of April, 1948, defendants took possession of plaintiffs’ storeroom, a part of said leased premises, and have failed and refused to permit plaintiffs the use thereof, all to plaintiffs’ damage.

XIII.

“That defendants have refused and neglected to provide plaintiffs’ light, heat and water for said restaurant business as required by said agreement, all to plaintiffs’ damage in the sum of five hundred seventy-five dollars (\$575.00).

XIV.

“That defendants have maliciously, wilfully and unlawfully operated and conducted gambling games interfering with and otherwise being detrimental to plaintiffs’ business all to plaintiffs’ damage.

(Testimony of Marvin Campbell.)

XV.

“That defendants have wilfully and maliciously injured plaintiffs’ credit rating, much to plaintiffs’ damage.

XVI.

“That on or about the 5th day of May, 1948, defendants did, with deliberate intent to injure plaintiff, maliciously, wilfully and wantonly prohibit the delivery of fuel oil to [519] plaintiff, all to plaintiff’s damage.

XVII.

“That on or about the 5th day of May, 1948, at the hour of 1:30 o’clock in the morning of said day, defendants took possession of plaintiffs’ restaurant premises, shut off the cook range, locked the premises and announced to plaintiffs’ customers that the premises were permanently closed and that plaintiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs’ business.

XVIII.

“That because of the acts of defendants, plaintiffs have been damaged in the sum of ten thousand five hundred seventy-five dollars (\$10,575.00).

XIX.

“That defendants threaten to continue interfering with plaintiffs’ business and that plaintiffs have no speedy or adequate remedy at law.

(Testimony of Marvin Campbell.)

XX.

“That defendants have threatened plaintiff with physical violence should plaintiff attempt to continue operating their restaurant business.

“Wherefore, Plaintiffs pray judgment against defendants as follows:

“1. For the sum of ten thousand five hundred seventy-five dollars (\$10,575.00) in actual damages.

“2. For the sum of Ten Thousand Dollars (\$10,000.00) in exemplary damages.

“3. That defendants and each of them be restrained and enjoined from in any manner interfering with plaintiffs’ business.

“4. For such other and further relief as the Court may deem equitable in the premises.

“McCUTCHEON & NESBETT,

“By /s/ S. McCUTCHEON,

“Attorneys for Plaintiffs.

“United States of America,

“Territory of Alaska—ss.

“Vern Humphries and Marvin Campbell, being first duly sworn, each for himself and not one for the other, doth depose and say: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

“/s/ VERNON HUMPHRIES,

“/s/ MARVIN CAMPBELL.

(Testimony of Marvin Campbell.)

Q. Was he there as many as ten different days, do you think? [522]

A. I never counted them, but I seen him there ever so often and when they were constructing the front and especially when he was constructing his liquor store he was there quite a bit.

Q. And that was during that period, was it?

A. Yes, he constructed on the place all during February.

Q. Do you recall what day it was, approximately, that there was this wild discussion with reference to the placement of the liquor store?

A. No, I don't know the exact date, somewhere around the end of February, I believe.

Q. Do you recall who was present?

A. Yes, Larry Starns was there and Joe Blackard and I was there, Vern Humphries, construction workers and foremen.

Q. Was Harold Brand there?

A. He could have been, he was around there quite a bit, living there, in fact.

Q. You don't happen to remember whether he was there at that particular time?

A. No, there was a lot of people grouped around there, he could have been there.

Q. Was Leo Tyler there?

A. I don't believe so.

Q. And at that discussion you don't recall having heard anything about a bond?

A. Well, when they started hashing it out I think that I [523] walked away.

(Testimony of Marvin Campbell.)

Mr. Cottis: Your Honor, I offer in evidence the entire file in this cause.

Mr. McCutcheon: Which file is it?

Mr. Cottis: 4979, the cause we are trying here.

Mr. McCutcheon: Well, I object to it on the grounds——

The Court: Objection is sustained.

Mr. Cottis: Will you mark for identification what purports to be an affidavit dated the 17th of May, 1948.

The Clerk: Defendant's Exhibit C for identification.

Mr. Cottis: I offer in evidence what has been marked Defendant's Exhibit C for Identification.

Mr. McCutcheon: No objection.

The Court: It may be admitted and may be read to the jury and marked Defendant's Exhibit C.

Mr. Cottis: It has the same title as Exhibit B that I read you a minute ago.

This is called:

“Affidavit in Reply to Defendants' Affidavit Opposing Application for Restraining Order”

and it is marked:

“Filed in the District Court, Territory of Alaska, Third Division, May 17, 1948.

“M. E. S. BRUNELLE,

“Clerk.

“By LOUISE ANNEBEL,

“Deputy.

(Testimony of Marvin Campbell.)

“United States of America, [524]

Territory of Alaska—ss.

“Comes now Vernon Humphries, being first duly sworn on oath, deposes and says:

“That plaintiffs have complied in every respect with all covenants and agreements to be kept and performed on the part of plaintiffs in connection with the lease agreement existing between Vernon Humphries and Joseph Blackard.

“That on or about the 2nd day of March, 1948, at the Panhandle premises, defendant Joseph Blackard, expressly waived the provisions of said lease agreement, requiring—‘Humphries shall provide bond in the sum of Three Thousand Dollars for the purpose of protecting Blackard from any claims made against Blackard and arising out of acts or omissions to act on the part of Humphries.’

“That on said date in the presence of Larry Starns, Harold Brand and others, affiant offered a bond in the sum of Three Thousand Dollars to the said Joseph Blackard and at that time inquired of the said Joseph Blackard if he would be satisfied with one Leo Tyler and Larry Starns as sureties. That the said Joseph Blackard thereupon advised affiant that he would not require a bond as provided in said agreement. That subsequently during negotiations for the sale of affiant’s restaurant business, Joseph Blackard again reiterated

(Testimony of Marvin Campbell.)

his waiver of the provisions of said agreement requiring a bond and advised the prospective purchaser that no bond had been required and none would [525] be necessary.

“Affiant further states that all provisions in said agreement for the payment of rent have been kept by affiant and that defendant, Joseph Blackard, is now indebted to affiant for moneys advanced for the payment of bills of the said Joseph Blackard.

“Affiant denies that he has at any time had illegal moose meat on the premises.

“That on or about the 12th day of May, 1948, in an action brought by Marvin Campbell and his mother, Anna K. Campbell, against defendants for possession of said Panhandle premises on the grounds that defendants had committed a breach of their lease by conducting gambling games on said premies and for other grounds, the jury found the defendants guilty.

“Affiant says that unless a restraining order continues during the pendency of this action, defendants will continue to conduct gambling games and otherwise interfere with affiant’s restaurant business.

“/s/ VERNON HUMPHRIES.

“Subscribed and Sworn to before me this 17th day of May, 1948.

“[Seal] /s/ S. McCUTCHEON,

“Notary Public in and for
Alaska.

“My commission expires: 12-31-51.” [526]

(Testimony of Marvin Campbell.)

Q. Now, Mr. Campbell, did you testify that the card games stopped within a week or two after April 10th?

A. I believe that they did.

Q. Mr. Campbell, who was the prospective purchaser who offered you and Humphries \$9,000 for the restaurant?

A. Slim Guyron.

Q. Would you spell his last name?

A. It always did tangle me up. It is G-a-r-v-i-n.

Q. G-a-r-v-i-n?

A. I believe that is it.

Q. Do you know what his first name is?

A. No, that is the name he always went by.

Q. How long have you known him at the time he made this offer?

A. He had been around there, I don't know exactly how long. Mr. Humphries had known him a lot longer than I had.

Q. He had been around the restaurant premises, had he?

A. Yes, as a customer.

Q. And about when was it that he made this offer?

A. Shortly before we went out of business.

Q. Would it have been after the first day of May?

A. Yes, it was.

Q. Were there ever any other prospective purchasers for the business that you can recall now?

A. No, I know we had several long discussions with this man. [527]

Q. With Garvin?

A. Yes.

(Testimony of Marvin Campbell.)

Q. How was he prepared to pay in his \$9,000?

A. It was a cash proposition.

Q. Did you investigate his credit?

A. No, but he was well known and he had backing.

Q. Was the \$9,000 to include equipment?

A. It was for equipment.

Q. Was it to include whatever inventory and supplies were on hand?

A. No, the inventory is always besides that?

Q. That is, the purchase price was to be \$9,000 plus the inventory of supplies? A. Yes.

Q. And the man was to pay that price in cash?

A. Yes.

Q. Now, did Blackard interfere with that sale?

A. He wouldn't approve of it.

Q. Did you ask him to approve of the sale?

A. He was asked to approve it.

Q. Did you ask him to approve it?

A. I didn't ask him.

Q. Did anybody ask him to approve it in your presence? A. No, I don't believe they did.

Q. How do you know that he was asked to approve it? [528] A. Why, I just know it.

Q. Now, you heard that portion of Defendant's Exhibit C which I just read to the jury which states as follows: "That subsequently during negotiations for the sale of affiant's restaurant business, Joseph Blackard again reiterated his waiver of the provisions of said agreement requiring a bond and ad-

(Testimony of Marvin Campbell.)

vised the prospective purchaser that no bond had been required and none would be necessary," were you present at that time?

A. Not that I know of.

Q. Do you recall any conversation at which Blackard told Garvin that no bond would be required?

A. I don't think that was the point that he was interested in.

Q. Was there any discussion at all with Garvin about bonds?

A. I didn't have any discussion with him.

Q. Did you hear any discussion with Garvin about the bond?

A. No, I wasn't around all the time.

Q. And, again, will you tell me when it was that these negotiations with Garvin were going on?

A. It was shortly before we closed out the restaurant.

Q. Would it have been after the middle of May?

A. It was somewhere around that time, I believe.

Q. Where is Mr. Garvin now?

A. I believe he is working at some construction camp.

Q. Near Anchorage? [529] A. Yes.

Q. How long since you have talked with him?

A. Why, I haven't been up here in a year to talk to anybody.

Q. Have you talked with him in the last year?

A. No, I don't believe I have.

(Testimony of Marvin Campbell.)

Q. What was his occupation at the time that he was negotiating with you for the purchase of the restaurant?

A. I don't believe he was doing anything.

Q. And what is his occupation now so far as you know?

A. I think he is cooking.

Q. He is cooking?

A. I believe he is.

Q. And you are testifying now that he was going to pay \$9,000 in cash, plus inventory?

A. Yes.

Q. Although he was unemployed at the time?

A. He was backed. He had backing to go into the place.

Q. Now, speaking of backing, can you tell the Court how much money you have advanced Vernon Humphries in connection with the restaurant business and in connection with these lawsuits?

A. No.

Q. Can you tell the Court how much money you have advanced Vernon Humphries in connection with the restaurant business?

A. The one down there?

Q. Yes. [530] A. I put up \$500 in cash.

Q. And that is all that you have ever advanced?

A. Well, I loaned him \$300 that I loaned off the bank before that, but that was repaid.

Q. Have you ever lent Humphries anything besides the \$500 and the \$300?

A. Not in connection with the Panhandle.

(Testimony of Marvin Campbell.)

Q. Did you ever pay any Panhandle bills that Humphries had incurred?

A. No, not out of my pocket.

Q. Well, how did you pay them, if you did pay any?

A. We paid a lot of the bills through the account in the Bank of Alaska Food Service, paid lots of bills.

Q. Did your mother ever lend any money to Alaska Food Service?

A. No, she had nothing to do with it.

Q. Did you read the complaint in this action before you signed it, do you recall?

A. I don't believe I did.

Q. You think that you did not read it, is that your testimony?

A. No, I don't believe I looked it over very closely.

Q. You are testifying that you don't believe that you looked it over very closely? A. Yes.

Q. That is your testimony? [531] A. Yes.

Q. Do you think that you remembered every word in it? A. No, I don't believe I did.

Q. Do you think that you looked at each paragraph in it?

A. We just told the story to our lawyer and I might have glanced over the papers but I think I left most of the detail up to him.

Q. You think that you glanced at each paragraph in it?

(Testimony of Marvin Campbell.)

A. It has been quite a while ago and I don't really remember what I did.

Q. Did you read that portion of the complaint, if you can remember, which states: "Vernon Humphries and Marvin Campbell, each being duly sworn, doth depose and say: 'That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.'" Did you read that portion of it as nearly as you can recall? A. I don't know what I did.

Q. Do you recall reading it or not reading it?

A. I don't remember much about it. I know I looked over those papers and signed them and that is about all I remember.

Q. Do you know whether during May the partnership comprised of you and Humphries borrowed eggs from Bob Cavera?

A. I wouldn't know a thing about it.

Q. Were you there during May of 1948? [532]

A. Yes, I was there but I was working mostly in the afternoon and evening and there could have been a lot of things happen in the morning that I didn't see.

Q. Was Mr. Humphries working at that time?

A. He was around there, I don't know if he was working or not.

Q. That was before he went outside on account of his—to have his daughter's health and his thumb looked after? A. Yes.

(Testimony of Marvin Campbell.)

Q. When *did* negotiations for the \$9,000 sale to Garvin were going on did you talk to Garvin—many times?

A. Yes, I was there when most of the discussion went on with him.

Q. Can you recall approximately how many times you talked with him?

A. Oh, we talked with him several times, I don't know exactly how many.

Q. Do you think more than three times?

A. I believe so.

Q. Where were most of these discussions held?

A. We talked to him on the street and in McCutcheon's office, different places, and in the restaurant, I believe.

Q. But you, yourself, never asked Blackard for his consent to that sale, is that correct?

A. No, I didn't talk to Blackard, as I remember.

Q. And these negotiations were going on just before you closed?

A. Sometimes around there.

Q. Within a week or two of your closing?

A. Yes, I believe so.

Q. Now, I want it to be clear, you didn't put any money into this business to begin with excepting the loan of \$500 and the loan of \$300, is that correct?

A. Yes.

Q. You had nothing else in it? A. No.

Q. And a month later in May you had an opportunity to sell it for \$9,000 plus inventory, is that correct?

A. Yes, along with Humphries.

(Testimony of Marvin Campbell.)

Q. I beg your pardon?

A. Along with Humphries.

Q. And you would have been entitled to half of that \$9,000 plus half of the inventory, is that correct?

A. That was never discussed.

Q. Well, you are equal partners, were you not?

A. Yes, but how we divided the money would be between us.

Q. Did you hear Mr. Humphries' testimony to the effect that your average daily running inventory approximated \$4,000?

A. Yes.

Q. Do you agree in that estimate? [534]

A. I don't know as much about prices as he would but I know we had a large amount of stock there.

Q. Then, it is your testimony that approximately a month after you acquired a full partnership interest in the firm you had an opportunity to sell it for \$9,000 plus inventory and you never asked Mr. Blackard if he would consent to that sale?

A. I didn't talk to Mr. Blackard personally.

Q. Were you eager to make the sale?

A. We would have liked to have straightened it out and that seemed to be the easiest way through a sale.

Q. Did you testify that the reason the sale had not gone through was because Blackard had refused to consent?

A. Yes.

Q. Is there any other reason that you can recall?

(Testimony of Marvin Campbell.)

A. That was what hinged upon the sale that it was agreeable to all parties. He didn't want to get into something where there was any antagonism at all and it was agreeable with all parties, well, he would take it over.

Q. So that was the reason that the sale fell through, was it? A. Yes.

Q. Did you hear Mr. Humphries' testimony that he had paid Clyde Graves \$2500 for that business at the first part of February, 1948?

A. Yes. [535]

Q. From your familiarity with the books of the business, do you know whether that is the figure that was reflected by those books?

A. I believe that is what he paid. I had several long talks with Clyde Graves myself, not in connection with the restaurant, but just as a landlord.

Q. Do you know whether that \$2500 was for the business outside of inventory or whether it included the inventory?

A. As far as I know it was for equipment.

Q. And no inventory was included so far as you know?

A. So far as I know there was no inventory in it.

Mr. Cottis: No further question.

The Court: Any further direct examination?

Mr. McCutcheon: No further direct examination.

The Court: Has the jury any questions?

(No response.)

The Court: That is all, Mr. Campbell.

Mr. McCutcheon: Call Mr. R. E. Hilgilen.

R. E. HAGLE

called as a witness on behalf of plaintiffs, being duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name, please?

A. R. E. Hagle. [536]

Q. What is your occupation?

A. Drive a cab.

Q. For whom do you drive cab?

A. Now I am driving a Red Cab.

Q. Where were you employed during the months of March, April and May, 1948?

A. Driving for Hy's.

Q. And who was your employer?

A. Frank Jones.

Q. Did you ever have occasion to make a trip to Wasilla for moose meat during the months of March, April or May?

Mr. Cottis: May it please the Court, I would like to suggest that the witness be warned about self-incrimination, Your Honor.

The Court: Yes, quite right. Mr. Hagle, under the Constitution of the United States and the laws

(Testimony of R. E. Hagle.)

of the United States you are not obliged to answer any question if the answer may incriminate or degrade you. If you are asked a question and it appears that the answer may render you subject to criminal prosecution you may rightly refuse to answer upon that ground, but you have to state the ground now, that is, the ground that your answer will incriminate you. Nobody can take this exception for you. So to make that exception for you you must make it yourself. So, if in your honest judgment the answer to the question counsel propounded to you may incriminate you you may [537] decline to answer.

Mr. McCutcheon: Would the Court advise the witness that the case on trial is of a civil nature?

The Court: The case on trial is a civil case in which Vernon Humphries and Marvin Campbell are plaintiffs and Laurence Starns and Joe Blackard and a third man, Glen Phillips, are defendants. This is a civil case. But the question asked you concerning moose meat is such that I do not know and perhaps you do not know whether your answer may conceivably lead to a criminal prosecution against you, not in this case but a criminal prosecution.

I am not inviting you to decline to answer, but I want to tell you about your Constitutional rights so that you can decline to answer if you honestly believe that your answer may incriminate you. Do you wish to answer that question?

(Testimony of R. E. Hagle.)

Mr. McCutcheon: Let me re-state the question, if the Court please. I will withdraw that question and ask a different one at this time.

Q. What is your name, Mr. Hagle? You stated your name when I first asked you and I didn't catch the name you gave to the Clerk?

A. R. E. Hagle.

Q. Is that your true name?

A. That is the name they have on subpoena but that is not my true name. [538]

Q. What is your true name?

A. Eldon Helgelien.

Q. Mr. Helgelien, during the months of March, April or May did you have occasion to make a trip to Wasilla? A. Yes, I did.

Q. And at whose request did you make that trip?

A. Well, I just had a call from the stand to go to the Panhandle and I picked up a native there and we went to Wasilla.

Q. And what did you do in Wasilla?

A. Well, this native picked up some meat.

Q. And put it in the car, did you?

A. Yes, he did.

Q. And you brought it back to Anchorage, did you? A. Yes.

Q. And where did you deliver the meat?

A. Well, we came back to town and we stopped in back of the Panhandle and from there, why, this native and I went down to, I guess it was, Vern

(Testimony of R. E. Hagle.)

Humphries' house and this native he unloaded the meat.

Q. And did you help the native unload the meat or did he unload it?

A. He unloaded it. I never touched the meat.

Q. Now, did you make a stop at the cab stand over at Hy's Cab Stand on the way down to Vern Humphries' house?

A. I don't remember now. I didn't think I did, but I wouldn't [539] say for sure whether I did or not, it has been——

Q. Do you remember seeing Frank Jones on your way back from Wasilla from the time you left Wasilla and the time the meat was deposited at Vern Humphries?

A. Well, I couldn't say whether I saw him or not; it has been quite a while ago, I don't remember.

Q. Do you remember having a discussion with me last evening? A. Yes, I do.

Q. And did you or did you not at that time last evening say that you did not see Frank Jones at any time?

Mr. Cottis: I object to counsel testifying, Your Honor.

The Witness: Well, I don't remember.

The Court: Wait until the Court rules on the objection. Objection is overruled, you may answer.

Q. (By Mr. McCutcheon): Did you or did you not last evening in your cab with myself present in response to a question put by myself to you as

(Testimony of R. E. Hagle.)

to whether or not you saw Frank Jones at the cab stand and pointed out the moose meat to him, did you not at that time say that you did not see Frank Jones?

Mr. Cottis: Object, Your Honor, he is going into collateral issues and he is trying to impeach his own witness; also he is testifying.

The Court: Overruled.

The Witness: I don't—stopping, I don't think I did. [540]

Q. (By Mr. McCutcheon): Your testimony is now, is it not, Mr. Hagle, that you did not see Frank Jones, was that——

Mr. Cottis: Object, Your Honor, it is a leading question.

The Court: Overruled.

Q. (By Mr. McCutcheon): Is that your testimony now that you did not see Frank Jones?

A. Well, I don't remember of seeing him.

Q. How long did you stop behind the Panhandle premises?

A. Well, I couldn't say now, I was there a little while, a few minutes.

Q. Did the native go in the Panhandle?

A. Yes, he did, he was out of the cab.

Q. You remained around the premises, did you?

A. Yes.

Q. Do you know whether or not the native took some meat out of your car at that time?

Mr. Cottis: Objection as being——

The Court: Overruled.

(Testimony of R. E. Hagle.)

The Witness: No, I don't.

Q. (By Mr. McCutcheon): You don't know whether he did or not, is that correct?

A. No, I don't know whether he did or not.

Q. And from there you went to Vern Humphries' house, did you? [541] A. Yes.

Q. And did you ever talk to Vern Humphries about this moose meat?

A. No, I have never talked to Vern.

Q. Did you know whether or not it was moose meat?

A. No, I didn't know it was moose meat.

Q. You looked at the meat, didn't you?

A. I saw him when he loaded it, yes.

Q. Was there any hair on it?

A. No, it just looked like ordinary meat to me.

Q. I want the answer to that question once more—was there any hair on the meat? A. No.

Q. Did it look the same as any other meat?

A. It looked like ordinary meat to me.

Q. Did you ever find out it was moose meat?

The Court: You are asking for hearsay testimony?

Mr. McCutcheon: Yes, Your Honor. I withdraw the testimony.

Q. Were you ever paid for that trip?

A. No.

Q. Had you ever made a similar trip at any other time? A. No.

Q. Had you ever discussed it with Mr. Humphries at any time?

(Testimony of R. E. Hagle.)

A. No, I never. I was working for the company there. [542]

Q. Had you ever discussed it with Mr. Campbell? A. No.

Q. And you were not paid for the trip, did you say? A. No.

Q. Do you remember how much the charge was?

A. No, I don't remember now, I was working for the company.

The Court: Trial will be suspended at this time. We have another matter at one o'clock. Ladies and gentlemen of the jury, you will be excused until two o'clock and the trial will be resumed then although the Court will reconvene at one. During your absence from the Court room you will not talk about the case or listen to any conversations about it or form or express an opinion until it is finally submitted to you.

Court now stands in recess until one o'clock.

(Whereupon, at twelve o'clock noon, the trial was recessed until two o'clock the same day.)

Afternoon Session

The Court: Clerk may call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, Your Honor.

R. E. HAGLE

previously called as a witness in behalf of plaintiffs, having previously been sworn, resumed the stand and testified as follows:

Further Direct Examination

By Mr. McCutcheon:

Q. Mr.——

Mr. Cottis: May it please the Court, I want to object to any further testimony at this time about the moose meat incident on grounds it might be proper rebuttal testimony but not properly part of the plaintiff's principal case. In other words, Your Honor, if the defendant in its defense introduces evidence of a moose meat possession then I can see that this would be fair rebuttal testimony.

The Court: Well, perhaps counsel is right but we have gone so far down to the end of the road that I think that we will have to proceed and treat it as evidence in plaintiff's case in chief and the objection of defendants is overruled.

Mr. McCutcheon: I would like to also submit, Your Honor, that counsel offered a notice that contained in that notice the charge——

The Court: Isn't that a matter of argument to the jury? [544]

Mr. McCutcheon: Well, it was read to the jury as I remember.

The Court: That is what I say, it is matter of argument to the jury and I have already ruled that the evidence is admissible at this time.

(Testimony of R. E. Hagle.)

Mr. McCutcheon: Yes, sir.

Q. Mr. Hagle, when you came from Wasilla you went to the Panhandle, did you? A. Yes.

Mr. Cottis: Objected to as leading, Your Honor.

The Court: Overruled.

Q. (By Mr. McCutcheon): Did you go to the Panhandle? A. Yes.

Q. To the rear entrance? A. Yes.

Mr. Cottis: Objected to as leading, Your Honor.

The Court: I realize the circumstances which may make leading questions proper but I wish counsel would try to avoid leading questions. It is a poor practice unless absolutely necessary under one of the exceptions.

Mr. McCutcheon: Well, the witness has been surprisingly cooperative, I realize, Your Honor. Well, all right.

Q. Now, how long did the Indian remain in the Panhandle? [545]

A. I couldn't say now, I don't—it has been quite a while. I don't know how long he stayed in there.

Q. How good is your memory with respect to that incident?

A. Not too good, it has been quite a while ago.

Q. Can you remember the Indian's name?

A. No, I don't even know his name.

Q. What did he look like?

(No response.)

Q. Can you describe him?

A. Just looked like another native to me, I couldn't describe him.

(Testimony of R. E. Hagle.)

Q. Was he a tall native or a short native?

A. Just like the average of them.

Q. Was he lean or heavy?

A. Oh, I don't know, I suppose about medium built, just about like most of the natives you see.

Q. Did you see anyone else present at that time?

A. No, he went in the Panhandle and he came out and we left.

Q. Was anyone with him when he came out?

A. Oh, not that I know of.

Q. Do you remember now whether or not Joe Blackard was with him when he came out to your car?

Mr. Cottis: Objected to as leading, Your Honor, the witness has already answered the question.

The Court: Overruled. [546]

Q. (By Mr. McCutcheon): Do you remember whether Joe Blackard was with him when he came out to your car?

A. I wouldn't say, all I saw was this native.

Q. Could Joe Blackard have been with him when he came out to the car?

Mr. Cottis: Object as leading.

The Court: Overruled.

The Witness: I couldn't say.

Q. (By Mr. McCutcheon): Did you have a conversation with Joe Blackard at that time?

A. No.

Q. Are you positive about that?

Mr. Cottis: Objection, Your Honor, as leading.

(Testimony of R. E. Hagle.)

The Court: Overruled.

The Witness: No, I never had any conversation with Joe.

Q. (By Mr. McCutcheon): Are you sure whether or not you saw him at that time?

A. No, I don't believe I did.

Q. Do you recall a conversation in your home on June 21st when Mr. Humphries and myself visited you there?

A. Yes, I remember coming down, I don't know the date.

Q. Did you not on June 21st—on or about June 21st—at your home here in Anchorage, Alaska, in the presence of myself and Mr. Humphries, in response to a question as to whether or [547] not you saw Joe Blackard there, you said, “Yes, Joe Blackard——”

Mr. Cottis: Objection, Your Honor, counsel is testifying. Also I would like to know what year this conversation occurred?

The Court: Overruled.

Q. (By Mr. McCutcheon): Did you or did you not in the presence of Mr. Humphries and myself at your home here in Anchorage, Alaska, on or about June 21st, this year, in response to a question put to you by myself, did you not at that time and place say that you saw Mr. Blackard come out of the Panhandle with the Indian and that he told you to deliver the moose meat to Vern Humphries' house, did you or did you not at that time and place make that statement?

(Testimony of R. E. Hagle.)

A. I don't believe I said anything about Joe Blackard. I said the native came out and that is the only one I remember of was the native.

Q. Did you or did you not make the statement that Joe Blackard came out with the native and told you to deliver the moose meat to Vern Humphries' house, did you or did you not make that statement?

Mr. Cottis: Objection, Your Honor, counsel is arguing with the witness and the question has been answered once.

The Court: Overruled.

The Witness: I don't believe I did. I said I saw this native, it was the only one that came out that I know of. [548]

Q. (By Mr. McCutcheon): Do you recall a discussion with me in the witness room ten minutes ago? A. Yes.

Q. At that time did you not say as follows: "Joe Blackard could have come out there; I could have said that to you down there at the house, I don't remember too well because I was sleepy," did you not make that statement a few moments ago?

A. I said I don't know for sure who came out. The only one I saw was this native and I couldn't say whether there was anyone——

Q. Did you or did you not make this statement that I have just repeated? Did you or did you not make that statement in the witness room ten minutes ago?

Mr. Cottis: May it please the Court, this testi-

(Testimony of R. E. Hagle.)

mony on the part of counsel over repeated denials by the witness is bound to lead the jury to believe that some such statement was made and I ask that counsel be cautioned not to use this method. It is prejudicial.

The Court: No, the questions may be asked and the jury is instructed now and will be instructed in the written charge that because a question is asked and the witness denies it and says no, the fact of the asking of the question is no indication whatever that the statement embraced in the question is factual or correct or true. In other words, it is your duty not to be [549] prejudiced or biased by the asking of questions. Your duty is to determine the credibility of the witness, in other words, what witness or what part of the testimony of any witness is true and what part may not be in harmony with fact. Counsel in the meantime has the right to ask the question.

Mr. Cottis: May it please the Court, if counsel could show that this witness was hostile I would not be prevailing in my objection.

The Court: Was this not the witness for whom bench warrant was issued yesterday?

Mr. Cottis: I don't think, Your Honor, but there is no——

Q. (By Mr. McCutcheon): Were you arrested by a bench warrant yesterday, Mr. Hagle?

A. Was last evening, yes.

The Court: It seems evident to me that counsel

(Testimony of R. E. Hagle.)

has a right to—within moderation—to use leading questions and under the law he has the right to put impeaching questions to any witness hostile or not, that is the right the law gives, a witness may be asked whether on another occasion he has or has not said something which is not in harmony with his testimony he has given on the stand. Any witness may be so interrogated.

Mr. Cottis: I object to it on direct examination.

The Court: That is the time it frequently comes in—on cross as well as direct examination. The objection is overruled.

Q. (By Mr. McCutcheon): Mr. Hagle, do you remember our having a conversation in the witness room about 20 minutes ago?

A. Yes, we had a conversation in the witness room.

Q. At that time and place did you not state in response to a question put by me as to whether or not at your home on or about June 21st you said Joe Blackard accompanied the Indian out to the car and told you to deliver the moose meat to Vern Humphries? Did you not in the witness room say, "I could have said that out at the house, I don't remember, I was sleepy, you just woke me up." Did you not make that statement in the witness room?

A. Well, yes, but I don't remember.

Mr. Cottis: May it please the Court, I just dislike ever so much harping on this but counsel now is going into a secondary collateral matter. He is

(Testimony of R. E. Hagle.)

trying to impeach the witness for saying something about a conversation on June 21st. I mean he is two degrees removed from anything at issue at this time and I object on that ground.

Mr. McCutcheon: May I be heard before the Court rules?

The Court: I am going to overrule the objection so there is no need for counsel——

Mr. McCutcheon: I would like to submit the law.

The Court: Well, the Court has already ruled.

Mr. McCutcheon: Very well, sir.

The Court: ——in favor——

Mr. McCutcheon: I am afraid the jury might somehow get [551] the impression that I was taking advantage of the witness or doing something that I am not entitled to do.

The Court: The Court has ruled you have the right to ask the question but the Court does warn the jury that the asking of the questions is no indication that what is embraced in the question is a fact.

Mr. McCutcheon: For counsel's information he may find this privilege——

The Court: Wait.

Mr. McCutcheon: I was about to refer counsel to Section 58-4-59 where he can find my right to ask the witness this question.

The Court: Proceed with the examination.

Q. (By Mr. McCutcheon): Did you or did you not make that statement at the time and place just mentioned?

(Testimony of R. E. Hagle.)

The Court: I think he has already answered that.

Q. (By Mr. McCutcheon): Well, did you or did you not make such an answer to my question in the witness room?

A. Well, I said I couldn't say for sure, the only one that I saw that had was the native that I remember of.

Mr. McCutcheon: Your witness.

Q. Have you talked to anyone about this case?

A. No. [552]

Q. No one at all? A. No.

Q. Well, you talked to me, didn't you?

A. Well, I talked to you, yes.

Q. Did you talk to Mr. Jones?

A. No, I haven't talked to Frank.

Q. Have you seen him?

A. I saw him in the witness room is all this morning.

Mr. McCutcheon: Your witness.

The Court: Counsel for defendants may examine.

Cross-Examination

By Mr. Cottis:

Q. How many times have you discussed this with Mr. McCutcheon?

A. Well, he was down at my house one day and I talked to him right here in the witness room today, probably two or three times.

Q. You talked with him last night, did you?

(Testimony of R. E. Hagle.)

A. Yes, I talked to Mr. McCutcheon.

Q. Where was that?

A. At his house.

Q. At Mr. McCutcheon's house? A. Yes.

Q. How long did you talk with him last night at his house?

A. Well, just a few minutes, probably maybe five minutes, three or four. [553]

Q. And then there was some conversation on June 21st, was there?

A. Well, there was a little; there wasn't much; he came up while I was sleeping.

Q. What year, this year or a year ago?

A. Yes, this year.

Q. At this time that you mentioned that you went to Wasilla with the native, can you recall whether that date could have been nearer the 1st of April or nearer the 11th of April?

A. I don't remember what date that was.

Q. You can't remember now which of those two dates it might have been nearer to?

A. I wouldn't know now.

Q. Mr. Hagle, how long did you drive for Hy's Cab?

A. It must have been about four months, I guess.

Q. That was during the late winter and spring of 1948? A. Yes.

Q. During that period did you ever know Joe Blackard to charter a Hy's Cab?

(Testimony of R. E. Hagle.)

A. Well, I couldn't say, he never chartered mine.

Q. You never knew of his having chartered any?

A. No.

Q. Do you know of Glen Phillips ever having chartered a Hy's Cab?

A. Not that I know of, no. [554]

Q. Did you know of Larry Starns ever having chartered a Hy's Cab?

A. No, not that I know of.

Q. Do you know of Vern Humphries ever having chartered a Hy's Cab?

A. Not that I know of, I don't know if he has or not. He has never chartered mine.

Q. Do you know of Marvin Campbell ever having chartered a Hy's Cab? A. No.

Q. Didn't Humphries charter the cab for this trip to Wasilla?

A. Well, I had this native. The native, I figured, was my charter. I figured he was the one.

Q. Did you ask the native to pay your fare?

A. Yes.

Q. What did the native say?

A. Didn't have no money.

Q. Did he deny his liability for the fare?

(No response.)

Q. Did he claim that he didn't owe you any money?

A. Well, I don't know, I just asked him for money, told him the company wanted some money and he said he didn't have any, so——

(Testimony of R. E. Hagle.)

Q. Did the native tell you where he was going to get his money from? [555]

Mr. McCutcheon: Objected to, calls for hearsay testimony.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Did the native make any promise about when he would pay you?

A. No, never.

Q. No, never made any promises, is that what you said? A. Yes.

Q. About what time was it when you got back to Anchorage, if you can remember, Mr. Hagle?

A. I don't know the exact time. It was late in the afternoon.

Q. And did you then park your cab behind the Hy's Cab Stand?

A. Not that I remember of, we stopped at the Panhandle and then from there I went on down to where this native took the meat.

Q. When you stopped at the Panhandle the native went into the Panhandle, is that correct?

A. Yes.

Q. But you did not, is that right?

A. No, I stayed in the car.

Q. Can you remember how long the native was in the Panhandle?

A. I don't remember how long he was in there.

Q. Did he go in the front entrance or the back?

A. He was in the rear.

Q. That is, from the alley?

A. Uh huh. [556]

(Testimony of R. E. Hagle.)

Q. Was he in there as long as an hour, do you know—do you think?

A. Oh, no, it was a matter of minutes, I couldn't say for sure but it wasn't too long.

Q. And when he came out he was alone?

A. As far as I can remember he was.

Q. Did he get back in the cab? A. Yes.

Q. And then where was it that you went?

A. Well, I couldn't say for sure, I don't believe we made any more stops. I believe we went down to where he unloaded the meat then.

Q. Where was it he unloaded the meat?

A. It was at Humphries' house.

Q. Had you ever been to Humphries' house before? A. No.

Q. Were you ever there after that?

A. No.

Q. When he unloaded the meat was it dark?

A. Yes, it was dark.

Q. Were there lights on in the house?

A. This house was lit up.

Q. Was there a car parked at the house?

A. I don't remember whether there was or not.

Q. Did you get out of your taxi at all at that time? [557] A. Oh, I was out.

Q. Where had the meat been in the taxi?

A. Where had it been?

Q. Yes, in what part of the taxi.

A. I put it in the trunk.

Q. It had been there in the trunk all the way down from Wasilla, had it? A. Yes.

(Testimony of R. E. Hagle.)

Q. How long do you think you were at Humphries' house altogether?

A. I couldn't say for sure, while he unloaded the meat.

Q. Did you have to get out and unlock the trunk to aid the native to unload the meat?

A. The trunk wasn't locked I don't believe.

Q. Did you have to get out and help the native anyway?

A. No, I never handled the meat at all.

Q. Where did the native leave the meat?

A. Pardon?

Q. Where did the native put the meat?

A. Well, he carried it up to the house, I don't know where he put it.

Q. Did he go in the door of the house?

A. Well, I believe he did.

Q. You believe he did not?

A. I believe he did, it was kind of a porch there or something, [558] if I remember.

Q. I am sorry, I just didn't get your answer, did you think the native went inside or not?

A. I believe he did, he took the meat out of the cab and there was a porch there on the house or something and he was in there.

Q. Was that on the front of the house?

A. Well, it was at the doorway there, I imagine it was the front.

Q. Had the native pointed the house out to you when you were driving him to the house?

A. Yes.

(Testimony of R. E. Hagle.)

Q. He said, "There is Humphries' house now," or something like that?

A. I didn't know where Humphries' house was.

Q. The native gave you directions for how to get there?

A. Yes, he was the one who had the cab. He showed me where to go.

Q. Well, did he say that it was Humphries' house or did he just say that it was a house he wanted to go——

A. Well, I didn't know for sure whose house it was but I found out it was Humphries' house, the native told me later.

Q. Who told you later? A. Native.

Q. The native mentioned Humphries' name?

A. Yes, he knew his name. [559]

Q. Did the native mention Marvin Campbell's name? A. Not that I know of, no.

Q. And where was this house, do you recall?

A. It was down over the hill on Fifth Street, I don't know the right address.

Q. In the vicinity of N Street?

A. Well, it is on either N or M or O, one of them.

Q. And did you testify that you later determined that that was Humphries' house?

A. Well, yes, it was Humphries' house.

Q. How did you find out it was Humphries' house?

A. Well, this native told me later when we went uptown that that was Humphries' house.

(Testimony of R. E. Hagle.)

Q. Where did you finally drop the native, do you remember?

A. I just dropped him uptown, it was between C and D Streets.

Q. Had you ever seen him before that you know of? A. No.

Q. How long, as nearly as you can recall, was it from the time you picked the native up at the Panhandle until your returned from Wasilla to Anchorage, in other words, when you entered the City limits coming back from Wasilla?

A. Will you repeat that again, please?

Q. Let me rephrase it. Do you recall about what time of day it was that you left Anchorage with the native to go to Wasilla?

A. It was in the morning, I don't know the exact hour. [560]

Q. Middle of the morning?

(No response.)

Q. Awfully early in the morning?

A. It wasn't too early; it was sometime in the middle of the forenoon.

Q. And do you recall about when you got back from Wasilla?

A. I couldn't say for sure but it was late in the evening.

Q. Had you ever seen the native before that you remember? A. No.

Q. Have you ever seen him since?

(Testimony of R. E. Hagle.)

A. I have never seen him.

Q. Have you discussed this case with Mr. Humphries? A. No.

Q. When you were subpoenaed was a witness fee paid to you? Was some money paid to you?

A. They paid me for one day when I sat here.

Q. How much was paid to you?

A. For sitting here.

Q. When they handed you a subpoena how much money was given to you?

A. Well, I got ten dollars for sitting here this day for losing my time in the cab stand.

Q. \$10?

(No response.)

Q. Who was it that gave that to you? [561]

A. McCutcheon.

Q. You have never discussed this case with me, have you? A. No.

Mr. Cottis: No further questions.

The Court: Have the jurors any questions?

(No response.)

The Court: Counsel for plaintiffs, any further redirect examination?

Mr. McCutcheon: Yes, Your Honor.

Redirect Examination

By Mr. McCutcheon:

Q. You say the native told you it was Humphries' house later on? A. Yes.

(Testimony of R. E. Hagle.)

Q. You remember that distinctly, do you?

A. Well, he told me sometime when I had him that it was Humphries' house after we left there.

Q. Do you remember that distinctly?

A. Well, I believe he told me that was Humphries' house.

Q. Do you remember that distinctly?

A. Well, yes.

Q. Now, do you remember distinctly whether or not Mr. Blackard came out with the native to the car? How is your memory on that point?

A. Well, I say I don't know whether he was with him or not. [562]

Q. You don't remember that part?

A. The only one I remember seeing is the native during the whole trip.

Q. Could Mr. Blackard have come out to the car with the native?

A. He could have walked out.

Q. And you do not remember it now?

A. It was dark then and the native got in the cab and I left.

Q. What was the native's name? I believe you answered you didn't know, do you?

A. I don't know his name.

Q. And you don't remember what he looked like, just like another native?

A. Just like an ordinary native to me.

Q. And you asked him for the fare, did you?

A. Well, I asked him if he was going to pay the fare and he said he didn't have no money.

(Testimony of R. E. Hagle.)

Q. And you had made a trip clear to Wasilla, hadn't you? A. Yes.

Q. How much would the fare have been?

A. Well, I don't know exactly how much it was, I was driving a company car.

Q. Well, do you have any idea what the fare was?

A. Well, it would have been pretty high, that it quite a way up there.

Q. How good is your memory on that point, how much did you [563] ask him for?

A. I just asked the native if he was going to pay for the trip and he said "No."

Q. Did you ask him for a certain amount or just ask him if he was going to pay for the trip?

A. I asked him if he had any money.

Q. And what did he say?

A. He said "No."

Q. Now did you ask him for the fare?

A. I just asked him if he had any money for the trip and he said, "No, I don't have any money."

Q. You didn't ask him for a sum certain?

A. No, because I didn't know what the fare would be.

Q. You expected he to pay the fare, didn't you?

A. Yes.

Q. You testified that he was your charter, didn't you? A. Yes.

Q. Now, do you know his name?

A. No, I don't know his name.

Q. Did you write it down anywhere?

(Testimony of R. E. Hagle.)

A. No.

Q. Well, didn't it occur to you that you might hope to get your money sometime after that?

A. Well, I just know him by sight is all.

Q. Did you expect to see him again? [564]

A. Well, I thought I would.

Q. Had you ever seen him before that time?

A. No.

Q. You said he looked just like another native, didn't you? A. Yes.

Q. How did you expect to recognize him again?

A. Well, I suppose if I saw him on the street I could maybe recognize him.

Q. And you didn't write his name down anywhere? A. No.

Q. Did you tell Mr. Jones that you had forgotten his name?

A. Well, I told Frank, "I haven't got the money," and Frank said he would see about it.

Q. Now, did you pick up a passenger on your way back from Wasilla?

A. He picked up two of his little kids.

Q. Who? A. This native.

Q. Were they with you all the time?

A. No.

Q. Where did you drop them off?

A. They left when we stopped back of the Pan-handle.

Q. Was there any charge made for hauling the children?

(Testimony of R. E. Hagle.)

A. No, there was his wife and there was two kids. I imagine it was his wife, it was a woman we picked up on the road. [565]

Q. Did he have the car on charter?

A. It was supposed to have been.

Q. What was charter time?

A. \$6 an hour.

The Court: How much an hour, sir?

The Witness: \$6.

Q. (By Mr. McCutcheon): Were you stopped out at the MP gate? A. No.

Q. You drove right through the MP gate?

A. I stopped and they asked me where I was going and I said Anchorage.

Q. Was there any inquiry made about moose meat there? A. No.

Q. If Mr. Jones stated that you stopped at the MP station and you had a close call would he be testifying truthfully or falsely?

A. I came through like I do any other time.

Q. Mr. Jones testified that you were stopped at the MP gate and you had a narrow escape on the moose meat there, was Mr. Jones testifying truthfully or falsely?

Mr. Cottis: Objection, Your Honor, it asks for a conclusion.

The Court: Objection is sustained. [566]

Q. (By Mr. McCutcheon): Did you ever make any effort later on to collect your money?

A. Well, Frank said he would collect it.

(Testimony of R. E. Hagle.)

Q. So you forgot about it, did you?

A. Yes.

Q. Well, how are you paid—out of the fare or does Mr. Jones pay or did Mr. Jones pay?

A. Supposed to get a certain per cent.

Q. Then you wouldn't be paid unless you collected it from the Indian, is that correct?

A. Yes.

Q. But you were satisfied when Mr. Jones said he would collect it, is that correct?

A. Well, if we couldn't collect he would collect for us on company car.

Q. Did you think at that time that Mr. Jones knew who the Indian was and could collect it?

A. Well, I thought he did.

Q. Did you think he did?

(No response.)

Q. And what caused you to think he knew the Indian?

A. I had just started driving; I hadn't driven there very long. I hadn't been driving very long.

Q. Was there an opportunity to take some of the moose meat out of the cab when you were parked behind the Panhandle? [567]

A. There could have been if somebody got in the trunk.

Q. Do you know whether or not they did?

A. No, I don't.

Q. Well, is it because you don't remember or you remember distinctly that they didn't?

(Testimony of R. E. Hagle.)

A. I don't know whether they did or not.

Q. You don't remember?

A. Yes, well I don't know whether anyone got in the trunk or not.

Q. You would remember it if they did, wouldn't you?

(No response.)

Q. Or would you?

A. Well, if they were in there I probably would remember it, but as I said I don't know whether anyone got in the trunk or not.

Q. You say you would probably have remembered it?

(No response.)

Q. You wouldn't definitely remember it, is that correct?

A. I don't know if anyone got in the trunk or not.

Mr. McCutcheon: No more questions.

The Court: Any further questions?

(No response.)

The Court: Mr. Hagle, please appear in Court on Friday, July 8th, at about two o'clock in the afternoon. It appears that you did not respond to a subpoena and it is proper for [568] the Court to look into that and I will inquire into it at that time. That is all.

Mr. McCutcheon: Plaintiff rests.

The Court: Plaintiff rests. Is there any need for keeping Mr. Hagle in attendance here?

Mr. Cottis: None so far as I am concerned.

The Court: You may be excused and report on Friday, July 8th, at two p.m.

Mr. Hagle: Right here?

The Court: Here in the Court room, yes, sir. Defendant may call a witness.

Mr. Cottis: Your Honor, I would like to make a rather serious motion, so far as I know I shan't say anything that will influence the jury but I leave it up to Your Honor's discretion. It would be rather prolonged, I am afraid.

The Court: I think maybe the jury had better retire to the jury room for a little while.

Counsel may proceed.

Mr. Cottis: Your Honor, because of the elaborate testimony I am afraid that the issues in this case might have been submerged a little. I am moving now for either an instructed verdict or for judgment for the defendants, and I should like to call the Court's attention to the Complaint in this action. It is an equitable proceeding and the issue that it raises is whether Humphries and Campbell are entitled to possession of the [569] premises. They ask for incidental damage relief both punitive damages and actual damages, but those damages and their right to the damages hinge primarily on their right to possession of the premises.

There is no allegation in the complaint that by any stretch of the imagination can be considered

a claim of breach of contract or damages from breach of contract. It is entirely a right to quiet and peaceful possession that is alleged.

Now I submit to the Court that the contract which is in evidence whether it is in the form that it appears in Plaintiffs' Exhibit 1 or whether it is in the form that appears in Plaintiffs' Exhibit 2 and 3. That in any event the contract is a mere license agreement and concession agreement combined. It lacks at least one of the essentials of a sublease in that it fails to define what space the plaintiffs are entitled to.

On Plaintiffs' Exhibit 1 the contract simply refers to a restaurant that is going to be moved somewhere. And Plaintiffs' Exhibits 2 and 3 refer to a restaurant and equipment that is to be moved 18 feet southerly, approximately. In either case it is not a sublease because it fails to define the premises and it fails to give any right to storerooms. It fails to state that the kitchen will be operated at 24 hours a day. And either version of the contract has in it a provision that Blackard can terminate the contract by written notice delivered 24 hours in advance of the effective date of termination. Now [570] there is no denial by the plaintiff and there is no dispute that such a notice was delivered.

The issues that are clouding the matter for the jury right now is whether that termination notice was just, whether there were actual defaults on the part of the plaintiffs and whether Blackard was right in trying to terminate it for the—for grounds

set out there. But I submit, Your Honor, that from the nature of the agreement Blackard had the right to terminate it and if he was wrong in serving a termination notice the plaintiff's proper remedy is an action for breach of contract and for damages, for failing to deliver the termination notice under the circumstances outlined in the contract. But breaching his contract by delivering the termination notice under other circumstances. But those are the issues that we are getting into on this case—is whether the substantive matters set forth in that notice were true or not, whether there was illegal meat and whether Humphries had paid the monthly fees he was supposed to have paid, whether the bond provision was to have been waived. That is the type of issue we have been getting testimony on and I submit that those issues are not consistent with the pleadings.

The pleadings are not a breach of contract affair, yet those issues obviously loom large in the jury's mind because we have spent so much time on them.

Now the actual complaint states as amended—includes [571] these things that plaintiff expended large sums of money in the construction of counter upon the said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business, including ranges, stools and other necessary fixtures and equipment. No evidence at all has been introduced of the money spent on construction of a counter, and as to the equipment counsel for the plaintiff promised to

connect up that testimony and I submit he has not done it.

There has been no allegation that the equipment was not returned to the premises as is provided by Plaintiffs' Exhibits 2 and 3 and under Plaintiffs' Exhibit 1 the equipment would not have to be returned to the plaintiffs.

But even if there were such proof and even if the complaint said that they had failed to return the equipment, which it doesn't, even then the proper action would be for breach of contract that Blackard had failed to comply with the terms of the contracts and had failed to return the equipment, so even then the complaint should be dismissed.

Now the next matter for complaint in the complaint is that the defendants have maliciously, wilfully and wantonly interfered with plaintiffs' business, resulting in great loss of profits to plaintiffs.

Now, all the testimony that the plaintiffs have come in—not a scintilla but every part of it has been to the effect that the gross receipts ran fairly constant over the three months in [572] the \$3,000 neighborhood and the undisputed testimony of theirs is that the purchase price at the beginning on February 4th was \$2500, that in May when they quit the premises the purchase price offered them was \$9,000.

And they say, and again it is going to cloud things for the jury, they say that Blackard interfered with that \$9,000 sale. Well, again, if Blackard interfered with that \$9,000 sale that is a matter for another complaint, it is not set out in here. There

is no talk of that and there is no allegation that Blackard interfered with any sale in this complaint.

Now, the next matter in here that the plaintiff's complain about is that on the 20th day of April, 1948, defendants took possession of plaintiffs' storeroom, a part of said leased premises, and have failed and refused to permit plaintiffs the use thereof. Now, what of it, Your Honor? If they admit, as all the evidence shows, that this termination notice was served on April 15th and that it purported to terminate the agreement on 24 hours' notice, and, if, as I say, their only remedy is not to ignore the termination notice but to sue Blackard for breach of contract for serving a termination notice when he wasn't justified in serving it. So it makes no difference what happened on the 20th day of April, 1948.

The next item is that the defendants have refused and neglected to provide plaintiffs light, heat and water for said restaurant business as required by said agreement, all to the [573] plaintiffs' damage in the sum of \$575. No evidence of any \$575 light, water or heat bill was put in. The only evidence put in was a cancelled check payable to the City of Anchorage of \$240 for deposit, which presumably was returned. But in any event the word "Agreement" considered as a restaurant agreement it was not intended to include fuel for stove.

The next, that the plaintiffs—that the defendants have maliciously, wilfully and unlawfully operated

gambling games interfering with and otherwise being detrimental to plaintiffs' business. Now there is a scintilla of evidence on that point that any card games operated were detrimental. Mr. Humphries so testified, other witnesses have not and there is that scintilla of evidence that card games were detrimental, but when it comes to backing it up with figures we are faced with the undisputed testimony that the business in March, April and May, each month, was in the neighborhood of \$3,000, and that the worth of the business as a sale proposition increased from \$2500 to \$9,000. So there is no damages connected with that thing.

Now, the next one is that the defendants have wilfully and maliciously injured plaintiffs' credit rating much to plaintiffs' damage. Plaintiffs' damage from any alleged credit rating injury has not been shown. Humphries or Campbell, either one, have not shown that they were ever turned down on any credit affair because of something that Blackard had said. [574]

The next one is that on or about the 5th day of May the defendants did with deliberate intent to injure the plaintiffs maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff, all to plaintiff's damage. There isn't any evidence at all in the plaintiff's testimony about fuel oil.

The next one is on or about the 5th day of May the defendants took possession of the plaintiffs' premises, shut off the cook range, locked the premises and announced to plaintiffs' customers that the premises were permanently closed and that plain-

tiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs' business. That is the same issue as the other one, as long as it was undisputed here that that notice was served on April 15th it can't make any difference what happened on May 5th except in a damage suit for breach of contract and that is the sum total of the allegations in the complaint except for the damages asked and the injunctions asked, and I therefore ask that the Court in the alternative either instruct the jury as to their verdict or dismiss the complaint for lack of evidence.

The Court: Mr. McCutcheon?

Mr. McCutcheon: If the Court please, Mr. Cottis contends that according to the testimony there was no sublease and I submit that there was a sublease and that it is material to this argument in that it was for a time less than the lease; that Blackard and Starns had a period of three years, which is in [575] evidence, and that it was subject to termination at a time earlier than that 3-year period which, I believe, is one of the tests of the subleasing. If it was for the total period it might be a partial assignment. It certainly was not a license. A rental was paid—6 per cent of the gross or not less than \$200, which I am sure under the weight of all modern authorities constitutes a rental. Many leases are written along those lines with the percentage of the gross take.

The other issues that counsel has raised, I believe Your Honor can rightfully let the jury decide and I submit that the case is entitled to go to the jury.

Mr. Cottis: Your Honor, with respect to Mr. McCutcheon's statement about the agreement. A criterion of a lease or sublease of course is that the lessee or tenant be permitted to occupy a definite location for almost any purpose, that the purposes be within his control.

Here instead of giving Humphries the right to occupy a specific location for all purposes except, say, gambling or illegal user, the Humphries is restricted to the operation of a restaurant and given no specific location. It is obviously left in Blackard's control. But on whatever space Humphries has he is subject to Blackard's control. If Blackard wanted to move the restaurant upstairs in the premises there is nothing that could prevent him from doing, and that is why it could not possibly stand up as a sublease. [576]

With respect to the notice that was served by Blackard or by the Marshal on Humphries terminating that agreement, four grounds of default are set out in it, two more have appeared here in this case without any dispute at all and there is no requirement in that contract that the notice specify the grounds of default, it is simply a courtesy on Blackard's part.

The other two grounds of default which have appeared undisputed on the plaintiffs' own side of the case: are (1) The contract was assigned from time to time without Blackard's written consent as is required there; and (2) it did not comply with the Federal, Territorial and City laws because

we operated without any restaurant license. So, altogether, there are now six grounds for terminating that.

The Court: The motions are denied and the Jury will be recalled.

Mr. Cottis: Your Honor, may I make a further motion?

The Court: Yes, surely.

Mr. Cottis: I want to make two motions and the argument will be identical. I ask that the complaint be dismissed as to the defendant, Glen Phillips, because no testimony has been adduced showing Phillips' liability and as a second motion I ask that the complaint be dismissed as to Larry Starns because nothing implicates Mr. Starns in this.

The Court: As to Starns there is enough evidence, in my judgment, to go to the jury. I am not certain as to Phillips, [577] but that motion too will be denied at this time. Counsel may renew it at the close of the entire case.

The jury may be recalled.

Without objection the record will show all members of the jury present and the Court will stand in recess until six minutes past three.

(Short recess.)

Mr. Cottis: Call John Brown.

JOHN BROWN

called as a witness on behalf of the defendants, being duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your——

The Court: Without objection the record will show all members of the jury present.

Q. (By Mr. Cottis): Your name is John Brown? A. Yes.

Q. Johnney, were you associated with Clyde Graves in the restaurant at the Panhandle Bar in 1947?

A. Yes, I was, from part of 1946 and '47.

Q. Did you see the Panhandle Restaurant premises after they had been remodeled for Humphries and Havins?

A. Yes, I was in after it was remodeled. [578]

Q. Where you and Mr. Graves operated that restaurant was the equipment adequate?

A. Well, there was more equipment added from the time we went in there than there was when we first went in, but it was bought between Clyde Graves and Charley Hardy that was handled, I didn't have anything to do with getting that equipment. But there was some—the only piece of equipment that I bought that went in there was the stove and that came from Army surplus property.

Q. Now, was any of Graves' equipment not in-

(Testimony of John Brown.)

cluded when Humphries and Havins took over that restaurant?

A. Well, they put some equipment there after I left. I left there in June, and when John Mannis and Clyde Graves were in there they put in some new equipment. I know there was a large meat saw.

Q. That they had put in?

A. They put in. They put in some new stools and they put in—there was quite a bit of cooking utensils like big gunboats and things like that they put in some of those and they had that one large refrigerator there I noticed that they put in there, that was put in there after I left.

Q. After you left but before Humphries and Havins took over? A. Yes.

Q. At the time Humphries and Havins took over was the equipment adequate to operate a restaurant there? A. Well, I guess so. [579]

Q. Did any items that Graves and you or Graves and Mannis had had there, were any of those items not included in the equipment that Humphries and Havins took over?

A. I couldn't say on that count because I don't know, but I know that most any of the equipment that went in there was under the agreement they had with Charley Hardy was to stay, such as when they took—when we took the old stove out and put the new stove in. In other words that belonged to Charley Hardy because removing one stove and replacing the other.

(Testimony of John Brown.)

Q. Now, oh, incidentally, were there any card games operated in there when you and Graves——

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

Q. (By Mr. Cottis): Were any card games operated on the Panhandle premises when you and Graves were operating the restaurant?

A. They played some pinochle there and things like that. I never paid any attention to it myself. I was cooking there most all the time.

Q. Did the games interfere with your restaurant business? A. No.

Q. Johnney, did you have occasion last Saturday to see a refrigerator at Glen Phillip's house?

A. Yes, I was out at Glen's house last Saturday evening, yes.

Q. What kind of refrigerator is it? [580]

A. Frigidaire is the company name on it, I believe Frigidaire.

Q. Had you ever seen the refrigerator before?

A. Yes, it was the one we used down there at the Panhandle all the time we were there.

Q. For how long a period was that?

A. It was there all the time I was there it was there before I was there.

Q. In other words when you went there in 1946 was that refrigidaire there? A. Yes.

Q. And are you sure it was the same refrigid-
aire? A. Yes.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: That is all unless the jurors have some questions?

(No response.)

The Court: That is all, Mr. Brown, you may be excused.

Mr. Cottis: Call Dr. O'Malley.

JAMES E. O'MALLEY

called as a witness on behalf of defendants, having been duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. Cottis:

Q. Dr. O'Malley, you are a duly licensed physician, practicing [581] in the City of Anchorage and have been for some time?

A. That is right.

Q. Do you know the plaintiff, Vern Humphries, sitting in the middle here? A. I do.

Q. Will you spell your name for the Reporter, Doctor?

A. O'Malley, O'M-a-l-l-e-y, James E.

Q. Have you ever treated Mr. Humphries or his family? A. I have.

Q. Did you ever advise Mr. Humphries that his daughter or any of his daughters should be taken outside for treatment?

A. Not to my knowledge.

Q. Do you recall whether Mr. Humphries hurt

(Testimony of James E. O'Malley.)

a finger in March or April of 1948? A. I do.

Q. Did any blood poisoning set in from that wound? A. A finger got infected.

Q. And will you describe the nature of the infection—how long it lasted?

The Witness: Can I testify to that, Judge, or is that privileged communication?

The Court: That is a privileged communication but if Mr. Humphries waives it you may testify.

Mr. McCutcheon: Are you testifying from notes, Doctor?

The Witness: No, I have my records here—some of my [582] records here—and there are some notes on the records.

Mr. McCutcheon: I would like to hear the question repeated again, if the Court please.

The Court: Read the question.

(Question read.)

Mr. McCutcheon: May I have just a moment? We don't wish to make an objection at this time.

The Court: There is no objection. Mr. Humphries waives whatever privilege there may be and you may answer, Doctor. Repeat that question again, please?

Q. (By Mr. Cottis): The nature of the infection that set into his finger?

A. Mr. Humphries sustained an amputation of one of his fingers—the tip of one of his fingers—sometime in March of 1948 and this was treated at

(Testimony of James E. O'Malley.)

Palmer, Alaska, by Dr. Lamberton, who amputated the tip of his finger and sewed it up accordingly. Inasmuch as Mr. Humphries lived in Anchorage and I was taking care of his family, why, he came to me for further treatment. And during the course of his convalescence the finger became inflamed but it readily responded to the usual measures that we use and by the time he left Anchorage sometime in April—last of April, I believe it was—he was practically healed.

Q. At the time he left there was no infection remaining?

A. No, there was no infection remaining.

Q. Did you advise him that he should have his finger treated [583] by medical experts in the States?

A. Not to my knowledge.

Q. And you don't recall ever advising any of his daughters to go outside for treatment?

A. I don't remember that, no. Does this objection—does this waiving of the privilege here cover the daughter?

The Court: I understand the waiver covers all of your testimony. If Mr. Humphries or his counsel wish to object this is the time to do it. You may answer, Doctor, no objection is heard.

The Witness: No, not to my knowledge. The little girl had an infection from time to time but there was no reason for her to go anywhere else for treatment.

Q. (By Mr. Cottis): If you had advised her or

(Testimony of James E. O'Malley.)

Mr. Humphries to go anywhere else would you remember it? A. I most certainly would.

Q. And you are definitely certain you never did give them such advice?

A. I don't believe I did.

Mr. Cottis: Your witness.

Cross-Examination

By Mr McCutcheon:

Q. Did you remove the little girl's tonsils, Dr. O'Malley?

A. Yes, I removed the little girl's tonsils on the first of July—around the 1st of July, 1947, or shortly thereafter. [584]

Q. And what was her general health at that time?

A. Well, I removed the tonsils of the little girl and the little boy and they had been ailing at intervals as children will all winter long with tonsillitis and I took out their tonsils.

Q. What were the little girls' state of health at the time you removed their tonsils——

Mr. Cottis: Objection——

Mr. McCutcheon: Your Honor, that is material.

The Court: Overruled, you may answer.

The Witness: I thought that she would be improved. I didn't think her health was particularly impaired but I thought it might be improved by a tonsillectomy.

Q. (By Mr. McCutcheon): Are you testifying from notes, are you, Doctor?

(Testimony of James E. O'Malley.)

A. No, this is my charge card. I know just when I did this thing. There is nothing remarkable about the two children except they had colds and tonsillitis and I thought they would have no further tonsillitis if I removed their tonsils.

Q. What was the little girl's general state of health following the removal of her tonsils?

A. I think she continued at times to have a little pus in her urine from time to time, which is fairly common in female children.

Q. What was her lung condition at that time?

A. Not particularly remarkable.

Q. Did you have occasion to examine her with reference to her lung condition?

A. Well, I used to see the children at regular intervals all winter long. The mother would bring the three or four children from time to time and I would go over each one of them, but I never saw that there was too much there.

Q. If you had suggested to Mr. Humphries that a warmer, drier climate might be more conducive to the little girl's health, is it possible that you could have suggested that?

A. I don't think that I would say that, because people in the so-called warmer, drier climates suffer from tonsillitis and colds. Alaska is no more unhealthy than Chicago.

Q. What is the general condition of her lungs at that time following her tonsillectomy?

A. I think the child's condition improved some-

(Testimony of James E. O'Malley.)

what, at least she had no further tonsillitis because her tonsils were out.

Q. Do you recall making any further examination of her lungs?

A. Not as such, all I can remember about the case is that the children were just like any other children and they got colds and upper respiratory infections all winter long for one reason or another, but not they were so seriously ill or anything like that.

Q. Did you make an examination of her lung condition following her tonsillectomy? [586]

A. I imagine I did, after all, I saw the children—that was in '47, and I continued to see the children at intervals until they left Anchorage around the 22nd of May, 1948.

Q. You stated that you “imagine you did,” Doctor, do you recall——

A. I believe that I did, let's say.

Q. You believe you did?

A. A choice of words there.

Q. Could it have been possible that you suggested that a change to a warmer, drier, climate might be more conducive to her state of health?

A. No, I don't think so. I will tell you why——

Q. Could it have been possible?

A. Anything could have been possible, but I remember distinctly that these people were leaving the City not from anything I did or said or recommended but it was in the course—usual course of

(Testimony of James E. O'Malley.)

events. They were leaving town, and I had nothing to do with it, to the best of my knowledge. I certainly wasn't the instigator of their leaving town.

Q. You misunderstand me, if they were leaving town as you recall, could it have been possible that you suggested that it was a good idea inasmuch as it might have been more conducive to the little girl's state of health—the new home where they——

A. They had no exact idea where they were going at the time. They had no idea of whether they were going to Minneapolis, [587] Texas, California. I had no reason to know where they were going, so I couldn't say that their health would be improved.

Q. You definitely remember that you did not make such a statement?

A. Because they didn't know where they were going, because they had several choices of places where they were going. They were going either to Minnesota, Kansas or California.

Q. Had you ever received any correspondence from Mr. Humphries since he has gone to the States?

A. My wife has received letters from Mrs. Humphries but not I.

Q. With reference to the little girl?

A. I don't know, they are my wife's letters. I don't examine my wife's correspondence.

Q. Your wife is a physician and surgeon?

A. My wife is a physician and surgeon?

Q. Did she treat the little girl?

(Testimony of James E. O'Malley.)

A. She did, yes, in the very beginning but she confines her practice to another specialty and gave the children to me.

Q. Do you know how many communications she received from the Humphries?

A. I have not the slightest idea.

Mr. McCutcheon: No further questions.

Mr. Cottis: Just one thing, Doctor.

Redirect Examination

By Mr. Cottis:

Q. Does Humphries owe you any money?

Mr. McCutcheon: Objected to as immaterial, incompetent and irrelevant.

Mr. Cottis: Mr. Humphries' credit is at issue here.

The Court: What is that?

Mr. Cottis: One of the issues in this case is Mr. Humphries' credit. It is set out in the complaint that his credit rating has been impaired.

Mr. McCutcheon: Renew the objection.

The Court: Objection is sustained.

Mr. Cottis: Thank you, Doctor.

The Court: Jury have any questions?

(No response.)

The Court: That is all. Another witness may be called.

Mr. Cottis: Call Frank Doyle.

FRANK DOYLE

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mr. Doyle?

A. Frank Doyle.

Q. D-o-y-l-e? A. D-o-y-l-e. [589]

Q. And what is your occupation?

A. I am with Kinkaid & King and at present I am on jury call.

Q. Mr. Doyle, did you know Kenneth Havins who was at one time associated with Vern Humphries in the restaurant business? A. I did.

Q. How long had you known Mr. Havins?

A. I have known Mr. Havins about two years, a little over two years.

Q. That is two years from now?

A. Yes, longer than that, about two years and one-half.

Q. Since the middle of '46?

A. 1947, yes, about the middle of '46 I knew Kennie.

Q. Where did you first know him?

A. He was with the railroad—the Alaska Railroad first and then he came with the Police Department.

Q. And were you on the Police Department at the same time?

A. I was on at the same time.

Q. Did you know him very well?

(Testimony of Frank Doyle.)

A. Yes, very well.

Q. Where is Mr. Havins now?

A. In California.

Q. When Mr. Havins and Mr. Humphries associated together to operate the restaurant at the Panhandle did you go into the Panhandle very frequently?

A. Well, I was there at the time they were remodeling it. [590] Kennie was going to go in business with Vern, but I believe he sold his interest to Hilton.

Q. Was there any dispute between Havins and Blackard? A. Not to my knowledge.

Q. Would you have known about it if there had been? A. I am sure I would.

Q. Was there any friction at all between them?

A. Not to my knowledge.

Q. And would you have known about it if there had been?

A. Yes, I believe Kennie would have said something about it.

Q. Mr. Doyle, have you been in the Panhandle fairly frequently or were you during March or April or May of 1948?

A. I was in there in—well, from time to time—from the time they were remodeling it and after they opened. I used to go in with Kennie and we would have coffee and I would stop and talk a little football with Joe Blackard.

Q. How long have you known Joe Blackard?

(Testimony of Frank Doyle.)

A. I have known Joe two years.

Q. When did you first meet?

A. Well, Joe had this Auto Service Center or was working there and I went down on an investigation. They had run away with Joe's Chevrolet.

Q. And that was two years or so ago?

A. It was in the summer of 1947 and I got to know Joe through that investigation of that safe.

Q. And that was before he had acquired any interest in the Panhandle?

A. Oh, yes, long before.

Q. When you were in the Panhandle, Mr. Doyle, did you ever see any card games being played?

A. No. No, the only time I was in there was during the day and I didn't see any card games during that time.

Q. Were there any card tables?

A. I believe there was a card table there but I don't know whether that was left from Tibbitt or Hardy but there was a table.

Mr. Cottis: No further questions.

Cross-Examination

By Mr. McCutcheon:

Q. You made a trip to Fairbanks, did you not, Mr. Doyle, in 1948? A. Yes, I did.

Q. Do you recall the date?

A. I believe it was in May—April or May.

Q. Could it have been in March?

A. No. No, I am sure it wasn't.

(Testimony of Frank Doyle.)

Q. Did you remain in Fairbanks?

A. Yes, all summer.

Q. What part of May did you go to Fairbanks?

A. I believe it was around the 15th of that—I am not sure. [592]

Q. How long after the restaurant was open did you go to Fairbanks?

A. Well, it seemed that the restaurant was opened a few months to my knowledge.

Q. Now, how often were you in the Panhandle premises in the months that you were here?

A. I think I was in the Panhandle about four or five times altogether.

Q. Altogether? A. Yes, sir.

Q. In the day time?

A. In the day time.

Q. And do you remember what months your visits were?

A. It was shortly after the Panhandle opened. I know I used to go in with Havins and we would have some coffee.

Q. A matter of days after the Panhandle opened, is that correct? A. Probably, yes.

Mr. McCutcheon: No further questions.

The Court: Has the jury any questions?

(No response.)

The Court: That is all, Mr. Doyle, you may be excused.

Mr. Cottis: Call Earl Ray.

EARL RAY

called as a witness on behalf of the defendants, having been [593] duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mr. Ray?

A. Earl Ray, R-a-y.

Q. A year ago last spring were you one of the owners of the Sunshine Market in Anchorage?

A. I was.

Q. Do you recall a refrigerator that was delivered there by Blackard or Phillips or anybody else at that time? A. I do.

Q. Who delivered it?

A. I took it down myself.

Q. Where did you get the refrigerator?

A. I got it from the Panhandle.

Q. And have you seen it recently?

A. Yes, I went down and saw it the other day.

Q. Where was it?

A. It was in Mr. Blackard's home, I believe, or Mr. Phillips' home, I am not sure which.

Q. And what kind of refrigerator is it?

A. It was a Frigidaire.

Q. And you are sure it was the same refrigerator? A. I am sure.

Q. Have you ever had any other refrigerator from the Panhandle [594] that you know of?

A. No, I haven't.

Mr. Cottis: Your witness.

(Testimony of Earl Ray.)

Mr. McCutcheon: No cross-examination.

The Court: That is all, unless, of course, one of the jurors has a question.

Mr. Cottis: Excuse me, could I ask you one more question, Mr. Ray?

Q. When you picked up that refrigerator at the Panhandle whom did you get it from?

A. I don't understand the question.

Q. Well, who did you ask about the refrigerator when you got it at the Panhandle?

A. I didn't ask anyone, just went down and got it. Preparations were made before I went down there.

Q. With whom had you made the preparations?

A. I hadn't made the preparations, my partner had.

Q. And do you know with whom he had made them?

Mr. McCutcheon: Objected to.

The Court: He can tell whether he knows or not. Overruled.

Mr. McCutcheon: Withdraw the objection.

The Witness: The question, please?

Q. (By Mr. Cottis): Do you know with whom your partner had made preparations [595] to get the refrigerator?

A. I understood that he had made preparations, but I was never very certain who he made the preparations with.

Mr. Cottis: No further questions.

(Testimony of Earl Ray.)

Cross-Examination

By Mr. McCutcheon:

Q. Had you been in the Panhandle frequently?

A. At that time?

Q. Yes. A. Yes, I had been in there.

Q. Were you in there during the months of March, April and May, 1948?

A. I was in there in February and March.

Q. Were you in there in April?

A. I really couldn't say, I don't remember.

Q. Did you deliver meat and groceries to the Panhandle Restaurant? A. Yes.

Q. And do you recall the months?

A. I don't know, it was probably April was in there, too.

Q. Do you recall seeing any card games there?

A. Yes, they did have a card game at the time.

Mr. McCutcheon: Your witness.

Mr. Cottis: No further questions.

The Court: Do the jurors have any questions?

(No response.)

The Court: That is all, Mr. Ray.

Mr. Cottis: Mrs. Frank Jones.

MRS. FRANK JONES

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mrs. Jones?

A. Mrs. Frank Jones.

Q. And what is your given name?

A. Frankie.

Q. You are the wife of Frank Jones who owns Hy's cab? A. Yes.

Q. Were you subpoenaed to be a witness in this case and by whom? A. By the Marshal.

Q. On behalf of whom?

A. Vernon Humphries.

Q. And have you been here every day waiting to be called?

A. Yes, I have except this morning.

Q. And you have never been excused by Mr. Humphries or his attorney? A. No.

Q. Mrs. Jones, at our request did you examine the accounts [597] of Hy's Cab to determine whether there was any indebtedness of Joe Blackard to Hy's Cab?

A. I did, and I couldn't find a thing on it.

Q. There was no evidence of any indebtedness?

A. There wasn't anything with his name mentioned on it.

Q. What about Glen Phillips?

A. Nothing with his name in it either.

(Testimony of Mrs. Frank Jones.)

Q. How about Larry Starns?

A. Nothing.

Q. If Joe Blackard owed Hy's Cab at any time the sum of \$145 would you have discovered it on your examination of the books?

A. It should have been in the books, yes.

Q. Did you happen to know whether there had ever been any account owed by Vern Humphries?

A. There had been.

Q. Do you recall how big the accounts had ever been?

A. No, not exactly.

Mr. Cottis: No further questions.

The Court: Counsel for plaintiff may examine.

Mr. McCutcheon: No cross-examination.

The Court: Have the jurors any question?

Mr. Cottis: May I have the Court's indulgence to ask Mrs. Jones a further question?

The Court: Yes.

Q. (By Mr. Cottis): Mrs. Jones, for some time you and your husband resided at Humphries' house?

A. I did, sir, and then he did later on.

Q. Were you yourself living there at the time that a fire occurred last October?

A. I was not; I was in the States.

Mr. Cottis: No further questions.

Mr. McCutcheon: No further questions.

A Juror: When a charge account is closed out, what happens to the records?

The Witness: We gave them to Mr. Humphries.

A Juror: I said, when a charge account is closed out, what happens to the records?

(Testimony of Mrs. Frank Jones.)

The Witness: We didn't have any records, sir, on it after we gave a card.

A Juror: I didn't ask you that.

The Court: He is not asking you about Mr. Humphries' account but about any account when any card account is closed out, then what happens to the record?

The Witness: The only record we have, sir, is some slips we put in a box, a card we keep and when that bill is paid up, the customer can have that if he wants it. It isn't kept in a large ledger in a cab stand like it might be in an office, is that what you mean?

The Court: Even if a charge account was had and was paid [599] do you have some record that there was an account?

The Witness: The customer would have a slip on it.

The Court: I mean you, would you have a record even if an account was entirely paid and closed out?

The Witness: They may have; I am not sure.

Mr. Cottis: May I inquire further, Your Honor?

Q. I believe what the juror is interested in is this, Mrs. Jones, how can you be sure that Blackard and Phillips and Starns never owed anything to Hy's Cabs on the book?

A. I can't be, sir.

Q. In other words, if they had owed something and had demanded——

(Testimony of Mrs. Frank Jones.)

A. If they hadn't paid it it would be there but if they had paid we possibly wouldn't have any record.

Q. And the case you wouldn't have any record was where they had asked for the slips at the time they paid up? A. Yes.

The Court: Do you wish this witness to remain here?—

Mr. McCutcheon: I don't believe so, not now.

The Court: —for possible rebuttal?

Mr. McCutcheon: For rebuttal, yes, we might need her.

The Court: Is there any chance of closing the defendant's case this afternoon?

Mr. Cottis: No, Your Honor, none. I would like to point out to the Court that Mrs. Jones has been here for a full week at least now. [600]

The Witness: I have been here every day, yes.

The Court: I am wondering if she couldn't be excused for this afternoon, anyhow?

Mr. McCutcheon: Yes, as far as we are concerned.

The Court: And do you wish her to report at ten tomorrow as your witness?

Mr. McCutcheon: Yes, we do. We don't know whether or not we will use her, it depends on what develops in defendant's case.

The Court: You are excused to report again at ten o'clock tomorrow morning.

Mr. Cottis: Your Honor, may I have about a

(Testimony of Mrs. Frank Jones.)

twelve-minute recess. I didn't realize that the plaintiff was going to rest so soon because he had witnesses there and I want to see what witnesses I have available on such short notice.

The Court: Very well, we will stand in recess until 3:45.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. Cottis: Call Mr. Schroeder.

ERNEST SCHROEDER

called as a witness on behalf of defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name?

A. Ernest Schroeder.

Q. Mr. Schroeder, what do you do for a living?

A. Foreman for the Bliss Construction.

Q. And where have you been today?

A. Down on the Montford residence, 2nd and Christianson Way.

Q. Were you a foreman for Bliss Construction in January and February of 1948?

A. I was.

Q. Have I ever discussed this case with you until just now?

A. No.

Q. Now, do you know the plaintiff Vern Humphries?

A. I do.

(Testimony of Ernest Schroeder.)

Q. Did you have occasion to do some work for Mr. Humphries in the Panhandle premises during January and February of 1948? A. I did.

Q. Did Mr. Humphries request Bliss Construction Company to do that work? A. Yes.

Q. Will you tell the Court as nearly as you can remember what work was done for Mr. Humphries?

A. We remodeled a counter for his restaurant.

Q. Now, was any bill ever given to Mr. Humphries for that work? A. Yes. [602]

Q. Now, Mr. Schroeder, I want you to be very careful about your testimony. Assuming, for example, that it has been denied here under oath that any bill was ever submitted to Humphries for that construction work, would your answer still be the same? A. Yes.

Q. You are sure that a bill was given to him?

A. Yes.

Q. How do you know?

A. I had to go down with Mr. Bliss to see Mr. Humphries two or three days, something like that, after he had opened his restaurant and go through the bill with him. There was some materials in there he didn't know just exactly where they were and how much there was and I pointed out on the counter where they were and how much was there and how much credit he had of the amount that I had purchased for it, it being black formica.

Q. That is a type of material, is it?

A. It is a type of material around the bottom

(Testimony of Ernest Schroeder.)

of the counter for a toeboard and also for a ledge where the chairs sat on as a binder.

Q. Did you have a conversation at a card table in the Panhandle? A. I did.

Q. And who was present?

A. Mr. Bliss and Mr. Vern Humphries and myself.

Q. How long did the discussion go on as nearly as you can [603] remember?

A. I think it was something about half hour.

Q. There is no doubt at all in your mind that Mr. Humphries was there?

A. He was there; he sat right at the table with us.

Q. Had a bill been submitted to him in writing at that time?

A. He had a complete set of bills for the entire job.

Q. And is that what he was criticizing?

A. That was what he was criticizing.

Q. In other words, he was questioning various detailed items on those bills?

A. That is right.

Mr. McCutcheon: Just a moment, now counsel repeatedly admonished me not to ask leading questions.

The Court: I have not found a lawyer to fail to ask all the leading questions he can.

Mr. McCutcheon: I wish Mr. Cottis would return the favor by attempting to refrain.

(Testimony of Ernest Schroeder.)

The Court: Objection is sustained and Mr. Cottis will refrain from asking leading questions. This is not a hostile witness as far as I can discern.

Q. (By Mr. Cottis): Will you relate as much of the conversation that took place three or four days after the opening of the Panhandle Restaurant in March, 1948, between you, Humphries and Mr. Bliss, as [604] you can recall?

A. Mr. Humphries promised us at the table that he had the money to pay for the counter.

Q. I am sorry, I didn't catch that?

A. Mr. Humphries assured me that he had the money to pay for the counter.

Q. At that time did he so assure you?

A. Said "Yes" Mr. Bliss and myself.

Q. What was the total amount of the charges due you at that time?

A. I don't remember exactly, it was about \$3,000.

Q. Now, relate anything else that you can remember of that conversation?

A. That was all.

Q. Well, didn't you testify that items had been questioned on the bill? A. Yes.

Q. Can you recall any other items that were questioned? A. No.

Q. Who had engaged you originally to do that work? A. Vern Humphries.

Q. Had there been any discussion at that time with respect to payment to Bliss Construction Company for the work? A. Yes.

(Testimony of Ernest Schroeder.)

Q. What was that discussion as nearly as you can remember? [605]

A. Before I started the counter he told me that Mr.—I forget his name—at The First National Bank—what is the cashier over at The First National Bank?

Q. Baker?

A. That Mr. Baker had the money.

Q. Had the money to pay Bliss Construction?

A. To pay Bliss Construction.

Q. And can you place about when that conversation took place?

A. It was some time in the last part of March, I believe, they had just opened their restaurant a few days.

Q. Well, you stated—did you just state that there was a conversation about Mr. Baker before you began work?

A. Yes, he told me that Mr. Baker would have the money, that he had to borrow it from Mr. Baker in the bank.

Q. Was that before the restaurant had opened?

A. That was before we started the work and he also repeated it the day we corrected the bill.

Q. On that day there was a further conversation about Mr. Baker, is that right?

A. Yes, he said—

Q. Did you have any conversations with Mr. Humphries while the work was in progress?

A. Yes, I gave him a carpenter, Miles Prince, to do the work and Mr. Humphries supervised him

(Testimony of Ernest Schroeder.)

nearly all the way through. I was in charge of getting the material and supervision that went [606] with it.

Q. Can you make any estimate of how many conversations you had with Mr. Humphries while the work was being done?

A. No, I couldn't exactly state that.

Q. Did you see him once a day or once a week?

A. Yes, an average of once a day.

Q. Were you on the premises quite frequently or not very much?

A. I was there quite steady on that job.

Q. How steady, do you think?

A. I would average at least 7 hours a day there.

Q. Of being on the Panhandle premises?

A. Yes.

Q. Was your company doing any other work on those premises?

A. Yes, they done work for Mr. Campbell and they done work for Mr. Blackard.

Q. Then there were three different contracts going on? A. That is right.

Q. Now, do you know what the work was that was being done for Mr. Blackard?

A. We built a bar for him—back bar and remodeled the Ladies' and Gents' washroom.

Q. Were you in charge of all three jobs?

A. I was.

Q. Can you tell us what work was going on for Mr. Campbell? [607]

A. Putting in a new floor, done under-painting

(Testimony of Ernest Schroeder.)

underneath a——

Q. Mr. Schroeder, are you familiar with the handwriting of Harold Bliss? A. I am.

Q. Would you recognize his signature if you saw it? A. Yes.

Q. Mr. Schroeder, do you recall anything about the mirrors that were put into the rest rooms at the Panhandle?

Mr. McCutcheon: Objected to as leading.

The Court: Overruled, you may answer.

The Witness: There were two mirrors on the old bar and they were removed and one was placed in the Ladies' restroom and one in the Gents' restroom.

Q. (By Mr. Cottis): Will you tell me again what you recall about the mirrors?

A. There were two mirrors on the old back bar that were removed and they were placed one in the Ladies' restroom and one in the Mens' restroom.

Q. Were the mirrors in good condition?

A. They were.

Q. Were there any other mirrors in the Mens' or Ladies' restrooms? A. No.

Q. How do you know that the mirrors that were put in the Ladies' and Mens' restrooms came from the old bar?

A. We removed them from the old bar. [608]

Q. That is, your company did, is that what you mean?

A. No, Mr. Blackard had a party there of his own that removed them and we took them and put them in each toilet.

(Testimony of Ernest Schroeder.)

Q. You installed them in the toilets?

A. Yes, they came off the old back bar.

Q. You are sure of that? A. Yes.

Q. Now, were there any mirrors for the new bar that you installed?

A. Yes, we furnished—I think there were four mirrors—four mirrors on that back bar, 36 by 48.

Q. Each of them was 36 by 48?

A. That is right.

Q. Where were those acquired?

A. They were acquired from the Bliss Construction.

Q. Did you testify you were on the premises about 7 hours a day while this work was going on? A. Yes.

Q. Did you ever hear any conversation between Humphries and Blackard and Starns about the length of the restaurant counter? A. No.

Q. Did you ever hear any conversation about a bond that was referred to and some agreement among the parties? A. No.

Q. Did Humphries ever pay Bliss Construction Company its [609] bill?

A. I don't think so.

Mr. Cottis: Your Honor, I have only one further question and that is with respect to a signature I had and I am unable to locate the document right now and I have no objection to cross-examination now if I may have the privilege of asking the witness that one question when counsel for plaintiffs is through.

(Testimony of Ernest Schroeder.)

The Court: Very well, counsel for plaintiffs may examine.

Cross-Examination

By Mr. McCutcheon:

Q. Where did you say the mirrors came from, Mr. Schroeder?

A. They came off the old back bar that was in there.

Q. Do you know whether or not Mr. Blackard bought them from Mr. Humphries?

A. No, I don't know who he bought them from.

Q. You say you didn't hear any reference to a bond?

A. No, I didn't.

Q. Well, could it have been possible that the conversation with reference to a bond had taken place while you were in the premises and you not heard it?

A. It is possible.

Q. Now, was work ever stopped at one time on the Panhandle premises because of a dispute between Mr. Humphries and Mr. Starns and Mr. Blackard, do you recall that?

A. No, I—I stopped the work on the restaurant due to a [610] dispute between Mr. Humphries and myself.

Q. Do you remember work being stopped because of a dispute between Mr. Humphries, Mr. Blackard and Mr. Starns?

A. No.

Q. At no time?

A. At no time.

Q. Do you remember a coal chute in the premises?

(Testimony of Ernest Schroeder.)

A. Yes, there was a coal chute in the place.

Q. Wasn't that coal chute boarded up when you remodeled the place?

A. I think we made a grill out of there, two by four grill.

Q. Across the top of the face of the coal chute, did you not? A. Yes.

Q. Have you done any work for Mr. Starns since that time?

A. I have never done any work for Mr. Starns.

Q. Have you done any work for Mr. Blackard since that time? A. No.

Q. Are you friendly with Mr. Blackard at this time? A. Yes.

Q. Are you friendly with Mr. Humphries?

A. Yes.

Q. Good friends, are you, you and Mr. Humphries?

A. As far as I am concerned we are.

Q. Did you ever have an argument—are you friends with [611] Mr. Campbell?

A. Yes.

Q. Do you remember an argument between Mr. Campbell, yourself and Mr. Bliss over the sum owed Mr. Bliss by Mr. Campbell? A. No.

Q. Do you remember making a bid on Mr. Humphries' home for the repair of damage caused by a fire? A. Yes.

Q. And do you remember a dispute you had with Mr. Humphries over that?

(Testimony of Ernest Schroeder.)

A. Didn't have no dispute there at all, Mr. Bliss is the contractor and does the bidding.

Q. Well, was there any dispute over that?

A. Pardon me?

Q. Was there any dispute between Mr. Bliss and Mr. Humphries over that bid?

A. I think there was, we didn't do the work anyway.

Q. Did you have any part in that argument?

A. No.

Q. Did you make the estimate for the bid?

A. No.

Q. Did you take a look at the premises?

A. I did.

Q. Well, did you have a contract with Mr. Humphries as to the remodeling of the counter? [612]

A. Just a verbal contract.

Q. What was the total obligation?

A. I beg your pardon?

Q. What was the total obligation at the completion?

A. I think about \$3,000, that included some plumbing and the total bill.

Q. Do you remember a dispute as to who owed the bills—Mr. Blackard or Mr. Humphries?

A. Mr. Humphries acknowledged the bill.

Q. Was the contract in writing?

A. No.

Q. Do you have any evidence that he acknowledged the bill?

(Testimony of Ernest Schroeder.)

A. Yes, I could—I could get testimony, I believe.

Q. You could what?

A. I can bring testimony, I believe, but it is out of town, though.

Q. Were you ever in the Panhandle premises after it opened? A. Yes.

Q. More than once?

A. Quite a number of times.

Q. In the month of April? A. Yes.

Q. Did you eat at the restaurant?

A. I did.

Q. Did you see the card games in operation there? [613] A. No.

Q. You didn't see any card games at any time?

A. No.

Q. Did you see any card tables there?

A. I seen card tables.

Q. Did you ever see a card table in operation?

A. No.

Q. Did you discuss this case with anybody prior to coming here? A. No.

Q. Ever? A. Never.

Q. How many card tables were there?

A. There were two on the premises all the while we were working there.

Q. You never saw a card game in operation after the premises opened? A. No.

Q. How often were you in there?

A. Oh, maybe a dozen times.

(Testimony of Ernest Schroeder.)

Q. Is it possible that a card game could be conducted there and you not see it? A. Yes.

Q. Were you there in the evenings?

A. No.

Q. Always in the day time? [614]

A. Day time.

Mr. McCutcheon: No further questions.

The Court: Is Mr. Bliss in the City?

The Witness: Yes.

Mr. Cottis: I am afraid I can't produce the document I was looking for, Mr. Schroeder, so I don't have any further questions.

Juror: In addition to the counter, the floor and the bar, did your company put a liquor store in the Panhandle?

The Witness: No.

Juror: How did you know it was Mr. Humphries that originally engaged you? Did he come to the shop or did he 'phone?

The Witness: No, he hired me right on the job while we were working for Mr. Blackard and Mr. Campbell.

Juror: In other words Mr. Blackard hired you first and while you were in the Panhandle Mr. Humphries engaged you?

The Witness: Yes, he had the restaurant concession there. He engaged us to remodel the counter.

Juror: He didn't visit the work shop or 'phone the offices?

(Testimony of Ernest Schroeder.)

The Witness: Pardon me, I don't understand?

Juror: Mr. Humphries didn't originally come to the work shop to engage the Bliss Construction Company?

The Witness: No, he hired Bliss Construction through me right there in the building.

Juror: Then the bill that was originally presented to [615] him—the first one—was it for old work on the restaurant?

The Witness: No, the bills were divided. We had three jobs there—one for remodeling the counter for Mr. Humphries, one for remodeling work for Mr. Campbell, and then Mr. Blackard had a bar bill.

Juror: But the one that was presented to Mr. Humphries was for work only on the restaurant?

The Witness: Only his work, yes.

Juror: When was the first bill presented?

The Witness: That I couldn't say.

Juror: Isn't it the general procedure to go through the office and then they mail them out?

The Witness: Yes. I have nothing to do with that end, I just supervise the building and the bills when they are totaled up and ready we send it out of the office.

Juror: Then the bill you discussed with him with Mr. Bliss was after payment was refused on the first bill?

The Witness: No, he didn't refuse to pay the bill.

(Testimony of Ernest Schroeder.)

Juror: But it was a number of days later?

The Witness: Yes.

Mr. Cottis: May I inquire, Your Honor? I think there might be some confusion if I don't.

The Court: Go ahead.

Redirect Examination

By Mr. Cottis:

Q. You testified, didn't you, that it was not paid later by Mr. Humphries, isn't that correct?

A. He promised to pay the bill the day we were there after we adjusted—showed him where the material was in that counter—the formica and chrome fittings.

Q. Your testimony was, so far as you know Humphries never paid the bill?

A. That is right.

Q. But he did acknowledge his indebtedness?

A. He did.

Q. In other words, if the bill has been paid somebody other than Humphries has paid it?

A. Yes, so far as I know.

Q. Was there ever any confusion among these three jobs; was there ever any doubt expressed by anybody as to whose responsibility this work was or that work was or this work was? A. No.

Q. It was all perfectly clear among you at all times? A. At all times, yes.

Juror: Have all three of those bills been paid now?

(Testimony of Ernest Schroeder.)

The Witness: I don't know, I have no access to Mr. Bliss' accounts. He handles that himself except in this one case here where there was a question there in regards to this material and he asked me if I would go down with him and point out to Mr. Humphries where it was and how much was there, which I did. [617]

Juror: Did the Bliss Construction Company build the liquor store?

The Witness: No.

Q. (By Mr. Cottis): Who did?

A. Daniel Wood.

Q. Is there any connection between him and your company? A. No.

Q. When Mr. Blackard engaged your company to do work on the bar was Mr. Starns also in consultation with you? A. No, not with me.

Q. Your only agreement was with Blackard, then? A. Blackard, yes.

Q. Did you have a written agreement with him?

A. I don't know about that, they gave him a quotation on that bar. I think there was a flat price on that.

Q. During the course of construction did Blackard for his work, Campbell for his work, Humphries for his work, confer with you from time to time with respect to details of the construction?

A. They did.

(Testimony of Ernest Schroeder.)

Q. Did Starns ever confer with you with respect to any of those details? A. No.

Mr. Cottis: That is all. [618]

Juror: Are you going to call Mr. Bliss?

Mr. Cottis: Yes, we will have Mr. Bliss here tomorrow, I hope.

Mr. McCutcheon: I would like to ask a further question.

Recross-Examination

By Mr. McCutcheon:

Q. You say you did nothing for Mr. Starns?

A. That is right.

Q. You remodeled the front of the building, did you not? A. For Mr. Blackard?

Q. Did you remodel the liquor store side, too?

A. Yes, for Mr. Blackard.

Q. Who paid you?

A. I don't know who paid the bill.

Mr. McCutcheon: No further questions.

The Court: That is all, Mr. Schroeder. You may be excused. Another witness may be called.

Mr. Cottis: Would you call Mr. Swackhamer, please?

DONALD F. SWACKHAMER

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your full name?

A. Donald F. Swackhamer. [619]

Q. Are you the same one who is the shortstop on the Anchorage Ball Team? A. Yes.

Mr. McCutcheon: I would like to ask the witness if he wasn't present in Court while Mr. Humphries was testifying?

The Witness: I was not.

Mr. McCutcheon: You haven't been present in Court at any time during any of the proceedings of this trial, have you?

The Witness: Thursday of last week I was here for approximately five minutes until the Judge asked me to leave.

Mr. McCutcheon: No objection.

Mr. Cottis: Was there objection?

The Court: No, counsel said "No objection."

Q. (By Mr. Cottis): Mr. Swackhamer, what do you do for a living now?

A. I am a grocery clerk at the Food Center.

Q. Did you ever work for Humphries?

A. Yes, I did.

Q. When?

A. Two weeks previous to the day of closing his restaurant, approximately 14 days.

(Testimony of Donald F. Swackhamer.)

Q. Can you remember about what month that would have been?

A. Last May—a year ago May, excuse me, May of 1948.

Q. Now, Mr. Swackhamer, what was your job with Humphries? A. I was a cook. [620]

Q. And what wages were you supposed to be paid?

A. \$16—two—two-dollars per hour.

Q. Have you ever been paid?

A. No, sir, I was allowed to draw \$40 of my wages by permission of Mr. Campbell and I had approximately \$250 coming and I only collected \$40 of which I was allowed to draw my wages.

Q. Had you worked anywhere before then?

A. Here in Anchorage?

Q. In Anchorage? A. No, sir.

Q. That was the first job you had had in Anchorage, then? A. Yes, sir.

Q. And how much were you paid for your two weeks' work? A. \$40.

Q. And how much should you have been paid?

A. Approximately \$250. I worked 14 straight days and two days of overtime pay plus twelve days straight pay.

Q. Have you been paid the balance yet?

A. No, sir.

Q. Did you have any private finances of your own at that time? A. No, I did not.

Q. Were any promises made to you with respect to payments?

(Testimony of Donald F. Swackhamer.)

Mr. McCutcheon: Objected to as leading?

The Court: Overruled. [621]

Q. (By Mr. Cottis): Did anybody promise to pay you your wages?

A. Yes, I was promised to get my checks.

Q. Who promised you that?

A. Mr. Campbell and Mr. Humphries both.

Q. Where were you to get your checks?

A. At the Panhandle Cafe.

Q. Mr. Swackhamer, where do you work now?

A. Food Center.

Q. And how long have you been working there?

A. Since last August.

Q. While you were working at the restaurant at the Panhandle for Humphries and Campbell did you have occasion to notice the amount of inventory of consumable supplies that were carried there?

A. Yes, I had access to them.

Q. What is your estimate of the average daily running inventory in dollars?

A. Oh, four to five-hundred dollars.

Q. Four to five-hundred dollars? A. Yes.

Q. At any time while you were there did the inventory get into the neighborhood of \$4,000?

A. No.

Q. Was there a coal chute on the premises somewhere? [622]

A. I believe there was, yes.

Q. Now, you testified that you worked there during the last two weeks before the place was closed, is that right?

A. Yes.

(Testimony of Donald F. Swackhamer.)

Q. Did you ever have occasion to go into the store room in the basement? A. Yes, I did.

Q. How did you go there?

A. I got the keys from Mr. Phillips and asked his permission if I could go into the cellar and obtain potatoes that were stored there.

Q. Did he give you the keys?

A. Yes, he did—no, he didn't give me the keys, he opened the door himself and let me in.

Q. Did you ever ask permission to go down there and be refused? A. No.

Q. Did you ever go down to the storeroom by any other means than the door? A. No, sir.

Q. Was there any merchandise other than Mr. Humphries' stored down there in that storeroom?

A. Not that I know of, no.

Q. Was there any merchandise other than Humphries' stored in the entrance to the storeroom?

A. I don't believe so, no.

Q. Now, when you talk of a \$400 inventory do you include all the storage places that Humphries had food stored?

A. Yes, I included meat supply, perishable and such stock as that at the time.

Q. No matter where it was stored on the premises, is that correct? A. Correct.

Q. Can you estimate for us what the daily running amount of perishables was in dollars?

A. Oh, I would say from \$75 to a hundred dollars.

(Testimony of Donald F. Swackhamer.)

Q. What type of things were in the basement storeroom when you were down there?

A. Potatoes only that I know of.

Q. And about how much potatoes?

A. Approximately four sacks—four or five sacks.

Q. How big were the sacks?

A. Hundred pounds.

Q. Were there any card tables in the premises while you were working there? A. Pardon?

Q. Were there any card tables near the restaurant counter when you were working there?

A. Yes, there were two that were unoccupied and turned up on end, stools were placed on them—rather, they were upside [624] down and were not in use. They were next to the back door.

Q. You never saw them in use?

A. Never saw them in use, no, sir.

Q. What shift did you work?

A. From ten to six, graveyard shift, ten in the evening until six in the morning.

Q. From ten in the evening until six in the morning? A. Yes, sir.

Q. During the two weeks that you were employed there was the restaurant open from those hours—from ten in the evening until six in the morning? A. Yes, sir.

Q. Every night so far as you know?

A. Every night.

Mr. Cottis: Your witness.

(Testimony of Donald F. Swackhamer.)

Cross-Examination

By Mr. McCutcheon:

Q. When did you work there, Mr. Swackhamer?

A. Two weeks previous to the day of closing.

Q. How old are you? A. 28.

Q. And you are a cook, are you?

A. I am.

Q. You are now employed as a grocery clerk?

A. I am. [625]

Q. How much experience have you had cooking?

A. I have had two years' experience. I owned two restaurants of my own in the State of Washington.

Q. And you say that the inventory was about \$400—four and five-hundred dollars?

A. Between four and five-hundred dollars.

Q. How much meat was carried?

A. Oh, I would say approximately \$300 to \$400.

Q. Well, then, your estimate of the inventory didn't include meat, is that correct?

A. It included meat and perishables—potatoes and such as that, yes, sir.

Q. Perhaps I misunderstood you, how much was the total inventory?

A. From four to five-hundred dollars.

Q. Now, again, how much did he carry in meat?

A. From three to four hundred dollars.

Q. Well, did he carry any flour?

A. What was in the bin.

Q. Well, how much was in the bin?

A. Approximately 40 pounds—30 or 40 pounds.

(Testimony of Donald F. Swackhamer.)

Q. How much is that worth?

A. I don't know wholesale, retail at 35-cents a pound,—no, I beg your pardon.

Q. How much a pound did you say? [626]

A. 35-cents for five pounds. I have forgotten all my prices.

Q. Well, approximately what would 40 pounds of flour be worth, Mr. Swackhamer?

(No response.)

Q. Can you approximate it?

A. No, I can't.

Q. How did you arrive at your estimate of the total inventory, you approximated that, didn't you?

A. 50 pounds of flour is \$2.85 for 50 pounds.

Q. \$2.85? How much potatoes did he carry?

A. I believe there was four or five sacks in the basements.

Q. How much a sack are potatoes?

A. Potatoes are \$7.75 per sack per hundred pounds.

Q. And how much meat did you say he carried?

A. From three to four hundred dollars' worth.

Q. And what kind of meat did he carry? Did he carry T-bone steaks or did he have a whole side of beef or what?

A. He carried several loins of pork—I would say two or three loins of pork.

Q. And what else?

A. Several cut steaks such as T-bones, ribs, porterhouse, chicken-fries.

(Testimony of Donald F. Swackhamer.)

Q. How many chickens did he have?

A. Chickens? I don't know.

Q. Do you have any idea? [627]

(No response.)

Q. Did you see some chickens there?

A. No, I don't believe there were any chickens there at the time.

Q. None at all? A. No, sir.

Q. Would you remember them if you had seen them? A. I imagine I would, yes, sir.

Q. And do you remember that there weren't any chickens there, is that correct? A. Yes, sir.

Q. What else did he carry in the line of meats and fowl?

A. The pork and the beef were about all that were there at the time.

Q. Did he have any hamburger?

A. Yes, ground beef.

Q. And how much of that did he have?

A. Approximately fifty pounds.

Q. And how much is that worth?

A. I don't know the price of hamburger.

Q. How did you approximate the total inventory if you didn't know the price of hamburger, Mr. Swackhamer?

A. It is an approximate estimate.

Q. Then what do you approximate the hamburger's worth to be?

A. Hamburger retails at approximately 75 to 80-cents per [628] pound.

(Testimony of Donald F. Swackhamer.)

Q. How many pounds were there?

A. Approximately fifty.

Q. Did he have any onions? A. A few.

Q. How many? A. Two pounds.

Q. Where were they kept?

A. In a cold-storage box out front.

Q. How many pounds did you say?

A. Approximately two.

Q. And what were they worth?

A. 15-cents a pound.

Q. Do you remember that there were two pounds there, do you? A. Approximately.

Q. Now, how about bacon, did you serve bacon and eggs? A. Yes.

Q. How much bacon? A. One slab.

Q. Even? A. Yes, I believe it was.

Q. How much is that worth?

A. Bacon retails at \$1.15 per pound.

Mr. Cottis: Your Honor, I ask that counsel's question be clearer as to whether he is talking about the termination [629] of the restaurant operation or the average day to day run of the inventory here?

Q. (By Mr. McCutcheon): What are you testifying to, Mr. Swackhamer?

A. The inventory kept on hand.

The Court: Counsel may proceed.

Q. (By Mr. McCutcheon): Now, did he have any fruits—canned fruits? A. No.

Q. None whatsoever? A. None.

(Testimony of Donald F. Swackhamer.)

Q. No canned peaches? A. No, sir.

Q. No canned grapefruit? A. No, sir.

Q. No canned apricots? A. No, sir.

Q. Did you ever serve fruit in the restaurant at all? A. No, sir.

Q. How about canned peas, did he have any canned peas?

A. Yes, there was, I believe, several No. 10 tins in the back rooms of canned peas.

Q. Did you ever use peas? A. Yes, sir.

Q. How many tins did you say? [630]

A. Two or three.

Q. And what were they worth?

A. One-dollar—one-dollar twenty per can.

Q. Did he have any coffee? A. Yes, sir.

Q. How much coffee?

A. One 20-pound can.

Q. And what is that worth?

A. 65-cents per pound retail.

Q. Well, did you estimate the value of the coffee that remained? A. Yes, approximately \$10.

Q. Did he have any sugar?

A. About 20-pounds in the bin.

Q. And did he have any soap?

A. Some that he had made himself, yes.

Q. How much soap?

A. About five pounds.

Q. Well, did he have any string beans?

A. No.

Q. Did he have any sauerkraut? A. No.

Q. Have any pickles?

(Testimony of Donald F. Swackhamer.)

A. Yes, there was one gallon of sliced dills there to serve sandwiches. [631]

Q. Did he have any dried fruit?

A. No, sir.

Q. No dried fruit whatsoever? A. No, sir.

Q. None whatsoever?

(No response.)

Q. No dried prunes? A. No, sir.

Q. Are you sure?

A. I saw no dried prunes.

Q. Did he have any canned beets?

A. No, sir.

Q. Well, what did you sell in this restaurant besides meat?

A. The supply was depleted and we sold what was there and aside from the meat items there was very little.

Q. Well, under what circumstances did you leave your job, Mr. Swackhamer?

A. The place was closed and Mr. Humphries asked me to stay on and clean up and that would be our last day.

Q. And do you know why the place was closed?

A. No, I do not.

Q. Did you ever overhear any arguments between Mr. Blackard and Mr. Humphries and Mr. Campbell? A. No, I did not.

Q. When did you leave the job? [632]

A. Approximately eleven o'clock of the same day it was closed.

(Testimony of Donald F. Swackhamer.)

Q. What day was that?

A. The exact date I don't know.

Q. Well, did the restaurant operate at all after you left there? A. No, it did not.

Q. It was closed then from then on, was it?

A. Yes.

Q. You talked with Mr. Cottis about the case, of course, didn't you, before you came here to testify? A. No, sir.

Q. You have never talked to Mr. Cottis about this case?

A. And who is Mr. Cottis, please?

Q. The gentleman standing right there?

A. Yes, I spoke with him.

Q. Didn't you know who I referred to when I said "Mr. Cottis"?

A. He did not introduce himself, no.

Q. Did you talk to Mr. Blackard?

A. I did.

Q. Did you talk to Mr. Castlio?

A. I don't know Mr. Castlio.

Q. How many tins of peas were there?

A. Two or three.

Q. Was there any corned beef there?

A. No. [633]

Q. None whatsoever?

A. None whatsoever.

Q. Any cabbage? A. No, sir.

Q. Any fish?

A. Yes, there was several slices of halibut and several slices of salmon.

(Testimony of Donald F. Swackhamer.)

Q. Any carrots? A. No.

Q. When did you first have occasion to remember the value of the inventory, Mr. Swackhamer?

A. From day to day I have been in direct contact with the inventory.

The Court: I think we shall have to suspend. Ladies and Gentlemen of the Jury, we will suspend now until ten o'clock tomorrow. You will remember your obligation not to discuss the case among yourselves or with others and not to listen to any conversation about it and not to form or express an opinion until it is finally submitted to you. You may now retire and report again at 10 o'clock tomorrow morning.

You may step down, Mr. Swackhamer and report again at 10 o'clock tomorrow morning.

(Whereupon, at five o'clock p.m., Tuesday, June 28, 1949, the trial was recessed until 10:00 a.m. Wednesday, June 29, 1949.) [634]

Wednesday, June 29, 1949.

The Court: Clerk may call the roll of the jury.

(Juror's names were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Mr. Swackhamer may resume the witness stand. Counsel may proceed with the examination.

DONALD F. SWACKHAMER

called previously as a witness in behalf of the defendants, having previously been duly sworn, resumed the stand and testified as follows:

Mr. McCutcheon: No further cross-examination.

The Court: Any further direct examination.

Redirect Examination

By Mr. Cottis:

Q. Mr. Swackhamer, do you recall whether there was any other method of getting into the storeroom that was in the basement other than going through the little entry-room near the Men's and Ladies' rest room?

A. Yes, there was. There was a trap door in the cooler by which we could enter the basement.

Q. Did you ever enter the basement that way?

A. No, I did not.

Q. Did you ever see anybody enter the basement that way? A. No, I did not.

Q. Was there any sort of wooden grill work over the door? [637]

A. Yes, I believe there was several boards across the opening.

Q. Do you know whether they were removable or not? A. They were?

Q. Were they nailed to the flooring at all?

A. No, they were loose.

Mr. Cottis: No further questions.

The Court: Do the jurors have any questions?

(Testimony of Donald F. Swackhamer.)

Juror: Which is the cooler? Could he show us on the diagram which the cooler was?

The Court: Well, if the witness knows he may answer. You may bring the chart up.

Mr. Swackhamer, this purports to be a drawing of the premises. You can point out, if you know enough about it, to point out, where the cooler is. If you don't know enough about the drawing to do that just don't attempt it even. You may go down and look at it.

Q. (By Mr. Cottis): This is supposedly Fourth Avenue. This is supposed to be the bar.

A. This is the liquor store here and this is the restaurant here and in this cool room was directly behind it. The cool room was directly behind the restaurant and here is the entrance to the cool room and just inside this entrance to the cool room there was a trap door approximately here that opened into [638] a cellar or basement below the premises in which there were potatoes kept down there.

The Court: Does any other juror have a question?

(No response.)

The Court: That is all, Mr. Swackhamer. Another witness may be called.

Mr. Cottis: Mr. Herning.

G. S. HERNING

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name?

A. G. S. Herning.

Mr. McCutcheon: Before counsel proceeds, Mr. Herning, you were present in the court room during a good part of this trial were you not?

A. I was.

Mr. McCutcheon: I object to the testimony of the witness, Your Honor, on that ground.

The Court: Objection is sustained.

Q. (By Mr. Cottis): When were you present? Your Honor, may I inquire a little further?

The Court: Yes. [639]

Q. (By Mr. Cottis): When were you present in the Court room, please?

A. I was present last week during two or three days during the first part of the trial.

Q. For a substantial amount of time each day?

A. Well, I was here both in the morning and in the afternoons.

Mr. Cottis: Very well, I guess you may step down.

The Court: Another witness may be called.

Mr. Cottis: Call Mr. Guard.

JACK GUARD

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name?

A. Jack Guard.

Q. What do you do for a living, Mr. Guard?

A. Cook.

Q. Whereabouts?

A. Anchorage Railroad now.

Q. Do you know Vern Humphries and Marvin Campbell? A. Yes.

Q. Do you know Joe Blackard? A. Yes.

Q. How long have you known those various people?

A. Oh, I met Joe just before he bought in the Panhandle. I have seen Humphries as a cook around town before—when he first came to town, I guess.

Q. And what about Marvin Campbell?

A. Not until I seen him washing dishes in the Panhandle, first time I ever seen him.

Q. Did you work for Humphries at the Panhandle? A. About four or five days.

Q. And do you recall when that was?

A. Well, it was either last of April or the first of May, right in there.

Q. Of 1948?

(No response.)

(Testimony of Jack Guard.)

Q. Then did you handle the kitchen in the Panhandle after Humphries had closed the restaurant?

A. Yes.

Q. And what period of time would that have been?

A. First day of June until the second or third week in July.

Q. What happened in July?

A. Well, I seen he couldn't make it, seen I couldn't make no money. I left—closed up and left.

Q. When you were working for Humphries did you observe any card games on the premises?

A. None whatsoever. [641]

Q. Will you describe Humphries' operations for the four or five days that you worked there, how long he kept the restaurant open and what sort of service he gave?

A. Yes, I think I was working the evening shift, if I remember right, it could have been days—it would be the afternoon shift, I guess. I am not sure but I think they were open 24 hours there—three crews.

Q. How many people were employed?

A. Oh, they were. I would say, four cooks there a day, I know that.

The Court: I didn't understand.

The Witness: There was one cook on each shift and then sometimes there was two then during that summer or something and made—and at least one girl all the time. There was quite a payroll there,

(Testimony of Jack Guard.)

I know that. There was a lot more than I had. There was about 60 or 90-dollars a day payroll.

Q. (By Mr. Cottis): How did the size of the payroll compare with your payroll when you operated the restaurant? A. More than double.

Q. More than double the number of employees that you had? A. Oh, yes.

Q. What were the circumstances of your leaving Mr. Humphries' employ?

A. We had a few words and he was disagreeable with me and I [642] left. I didn't care to stay there any way.

Q. Had you been in restaurant work before you went to work for Mr. Humphries? A. Yes.

Q. Where was that?

A. I had worked in, oh, Totem Club and Thompson's, and worked in Anchorage a couple of years before that or three outside.

Q. Did you ever own your own restaurant anywhere?

A. A couple of little lunch counters in the States.

Q. Whereabouts in the States?

A. I ran one at Lone Pine, California, once and one in Inyokern.

Q. Mr. Guard, when you took over the restaurant, will you describe what condition it was in?

A. Well, it wasn't in any condition, as far as that goes, the doctor ordered that stuff taken out of those iceboxes and destroyed and got permission from Mayor Loussac to burn it that night at the

(Testimony of Jack Guard.)

garbage dump. It was after hours. And then we worked about a week or two there, somewheres around ten days or so, cleaning that place up enough. The doctors wouldn't let me open it.

Q. Would not let you open it?

A. Well, we had to work that long before he would say it was clean enough to open and ready.

Q. About how long did you have to work? [643]

A. I worked a good week, maybe 10 days, I know that.

Q. What sort of work did you have to do?

A. Clean it up, scrub them ice boxes and floors, and the ones in the back and the ones up in front and put that sheet aluminum over that meat room and stuff and had some painting done, too; didn't have to have the painting, I guess, but I did, a lot of little things that he said should be done.

Q. Will you describe what, if any, stock of goods was on hand when you went in there?

A. Oh, there were some napkins and stuff upstairs and one case of them was open and one wasn't. Most of the stuff was in the basement, lots of sauerkraut and beets and stuff—canned vegetables that wasn't of any use to me, you know, I didn't want to buy them. A lot of the stuff was left open. There were no great large amount of anything that was useable for my type of feeding anyway.

Q. What did you do with the stock that was on hand, if anything?

(Testimony of Jack Guard.)

A. It was in the basement when I left there.

Q. Just as you had found it?

A. Yes, just as I had found it. I didn't bother it.

Q. Did Mr. Humphries or Mr. Campbell ever ask you to turn it over to them? A. No, no.

Q. And when was it that you left there? [644]

A. About the third week in July, I guess.

Q. Was the restaurant licensed when you went there?

A. There was no license on the wall of the restaurant when I went there and I came down here to the Federal Building and got license for the restaurant and took them up.

Q. Can you estimate in dollars what the average stock of consumable goods was during the time that you were working for Humphries?

A. It would be hard to estimate that because I was only there four or five days. I think I was in the basement but there never was no large amount of stock in that Panhandle at any time because there is not room to get it unless you lug it all down stairs. There is no room for a large amount of stock in that upstairs part where the cafe was.

Q. Will you describe how you got to the downstairs storeroom?

A. Well, you could slide stuff down from that back there—the chute—or you could go down the stairways—through the stairway going to the furnace room.

(Testimony of Jack Guard.)

Q. Now the stairway that you refer to, is that the one at the end of the bar?

A. In the little room next to the end of the bar, yes.

Q. Where is the chute that you refer to?

A. Well, it was going to the back storeroom of the restaurant. The restaurant had a storeroom. There was an old chute fixed [645] there like, I covered it up.

Q. Were there any steps in it?

A. Not to my knowledge unless put them in, I never did go down that way.

Q. Did you ever see anybody go down that way?

A. They had taken stuff down that way before.

Q. Had you ever seen anybody bring anything up that way?

A. I can't recall that I did but I know the dishwashers used to slide stuff down that way, maybe go down, I don't know, before I got there.

Q. Were there any gambling—any card tables on the premises? A. At what time?

Q. When you were working for Humphries?

A. Never seen no gambling in the Panhandle for years. There was some old tables people used to sit around that people used to eat at.

Q. How many, do you recall?

A. Surely wouldn't have been room for over one in there after they remodeled, used to be two there years ago sitting there.

Q. What did you do with the tables when you took over the restaurant or with the table?

(Testimony of Jack Guard.)

A. I guess that table wasn't there when I took over. I put a table in there for the restaurant—a nice table with [646] chairs and I guess that card table wasn't even in there then.

Q. What kind of table did you put in?

A. One that I sold to Joe.

Q. Where did you buy it?

A. At Wolfe's Hardware.

Q. And what happened to it when you left the premises?

A. When I left it was still there. I sold it to Glen and Joe.

Q. Did they pay you for it? A. Yes.

Q. Do you remember how much?

A. It was around \$75.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

Juror: When did you take over the Panhandle Restaurant?

The Witness: About the first day of June, it was either the last day of May or first of June, I opened but I was around there about ten days cleaning it up before we opened.

Juror: What year?

The Witness: 1948.

The Court: That is all, sir. Another witness may be called.

Mr. Cottis: Mrs. Guard.

RUTH GUARD

called as a witness in behalf of defendants, being duly sworn, [647] testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mrs. Guard?

A. Ruth Guard.

Q. What do you do for a living?

A. Waitress work.

Q. Whereabouts are you working now?

A. At the Cheechako.

Q. How long have you been working there?

A. Well, this last time since April. I have been working there off and on for the last three years.

Q. You are a waitress connected with the restaurant there, are you? A. Yes.

Q. Are there any card games at the Cheechako?

Mr. McCutcheon: Objected to as immaterial.

The Court: Objection is sustained.

Mr. Cottis: Your Honor, anything which would bear on the effect of card games on restaurant business, I think, should be heard.

The Court: We will be here until next Christmas once we open the door to other places besides the Panhandle. Objection is sustained.

Mr. Cottis: Very well. [648]

Q. Do you know the plaintiff, Vern Humphries?

A. Yes.

Q. Do you recall when you first became acquainted with him? A. Yes.

(Testimony of Ruth Guard.)

Q. When was it?

A. Well, when my husband went to work for him.

Q. And do you remember about when that was?

A. No, I can't recall just when it was.

Q. Can you approximate what time of what year it was?

A. It must have been in June last year.

Q. Of 1948? A. May or sometime.

Q. Were you in the Panhandle premises frequently? A. Yes.

Q. That is, while your husband was working there, was it?

A. Well, not only that, I had been in there before.

Q. Did you ever see any card games going on in the Panhandle?

A. I never paid any attention to them.

Q. Did you ever see any evidence of disturbance between Joe Blackard and Vern Humphries in there? A. No.

Q. Did you ever see any evidence of disturbance between your husband, Jack Guard, and Vern Humphries in there? A. No.

Q. Do you recall what shift your husband was working when [649] he worked for Humphries?

A. I think it was relief but I am not sure.

Q. And what hours would you mean by that?

A. Well, different shifts for different people, I don't know for sure just what shift he did work.

(Testimony of Ruth Guard.)

Q. When your husband took over that restaurant did you work there with him? A. Yes.

Q. During that time were there any card games on the premises that you recall? A. No.

Q. Did you have any written agreement with Blackard or Phillips when you and your husband operated the restaurant? A. No.

Q. Who paid for the fuel and heat—stove heat—while you were operating?

A. We paid for the oil for the range.

Q. Did you pay any electricity bills?

A. One or two, I think is all, one, I think.

Q. What about water, do you remember?

A. We didn't pay water that I know of.

Q. Do you remember how many electric meters were connected to the premises?

A. No, I don't.

Q. Did you have to make any electricity deposit with the [650] city?

A. I believe Jack made one, I am not sure.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: That is all, you may step down, Mrs. Guard. Another witness may be called.

Mr. Cottis: Could we have a short recess, Your Honor.

The Court: Court will stand in recess for five minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

C. WESLEY HEVERLING

called as a witness on behalf of the defendants,
being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is C. Wesley Heverling?

A. Yes, sir.

Q. What is your occupation, Mr. Heverling?

A. Co-owner of City Fuel.

Q. You are a partner in City Fuel, are you?

A. That is right.

Q. Did you during the spring of 1948 have any dealings with Vern Humphries in connection with your fuel oil business? A. I did. [651]

Q. Can you tell the Court what deliveries of fuel you made to Humphries?

A. Can I refer to——

Q. Certainly, refresh your memory with anything you happen to have?

A. These are records off of the ledger. I made deliveries to him through the months of April and ended in May 7th.

Q. You have the quantities of the deliveries and the dates?

A. Not all of them, not from the start.

Q. Do you have them during that period of time that you just referred to? A. I do.

Q. Would you tell us what they were?

A. There was on April 7th, I delivered 196 gallons and April 14th I delivered 188 and April 21st

(Testimony of C. Wesley Heverling.)

I delivered 195½ and April 28th I delivered 214, and May 7th, which was the last, I delivered 234.

Q. Now, how did that come to be the last delivery?

A. I had an agreement with Mr. Humphries that in his business if he took care of his bill monthly and promptly the oil would be continued to be put in the tank and I would be responsible and take care of the tank; in other words I watched it. I would check it at times to see that it wasn't empty, and why the last delivery was made, which was May 7th, he had failed to take care of the previous month's bill. [652]

Q. Has it been taken care of yet?

A. No, sir.

Q. And that bill ran from what date in April was it?

A. April 7th to including May 7th.

Q. Mr. Heverling, in the plaintiff's complaint in this action that is being tried is the following allegation "That on or about the 5th day of May, 1948 defendants—" meaning Blackard, Phillips and Larry Starns—"—did with deliberate intent to injure plaintiff—" meaning Vernon Humphries and Marvin Campbell "—maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff, all to plaintiff's damage." Did any of those defendants ever prohibit the delivery of fuel oil to Humphries or Campbell?

A. No, sir.

Q. When you stopped deliveries was that according to the custom of your concern?

(Testimony of C. Wesley Heverling.)

A. That is right.

Q. Also in the complaint is stated the following "That the defendants—" meaning Blackard, Starns and Phillips "—wilfully and maliciously injured plaintiff's credit rating, much to plaintiff's damage." Did any of the defendants ever talk to you about Humphries' or Campbell's credit?

A. No, sir.

Q. Did anybody injure Humphries credit so far as you were concerned? [653]

A. No, sir.

Q. Do you know what your concern's views of Humphries' credit rating were prior to April, 1948?

Mr. McCutcheon: What was that question, again? Excuse me, I didn't follow the question, Your Honor.

The Court: Reporter may read the question.

(Question read.)

The Witness: Just in regards to myself in business?

Q. (By Mr. Cottis): What were your own business views?

A. Rather slow.

Q. That is, he was a slow credit risk?

A. That is right.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: That is all; another witness may be called.

Mr. Cottis: Call Mr. Harold Bliss.

HAROLD BLISS

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Harold Bliss?

A. Yes, sir.

Q. And you own the Bliss Construction Company here in town? [654]

A. Yes, sir.

Q. Mr. Bliss, do you know the plaintiff, Vern Humphries?

A. Yes, sir.

Q. Did you ever have any business dealings with him in connection with the Panhandle Restaurant?

A. Yes, sir.

Q. Will you relate to the Court what those dealings were?

A. Well, we were doing some work there for Mrs.——

Q. Will you state that again. Sit a little nearer the microphone, Mr. Bliss?

A. We were doing some work for Mrs. Campbell repairing and placing floor and different work on the building and Mr. Humphries had taken over the restaurant there and asked us to rebuild the bar in there. They moved it from the front to the rear of the building and we done this work for him and several little jobs around the building. Also there was quite a lot of plumbing that had to be done and he wanted us to handle that for him and

(Testimony of Harold Bliss.)

we got the Anchorage Insulation to do the plumbing work.

Q. Can you recall about when all this occurred?

A. I couldn't give you the dates of it; it was during this time that we were working on Campbell's place. It would be in the winter of '48, I believe.

Q. Were you doing any work on the premises besides the work you were doing for Campbell and the work you were doing for Humphries? [655]

A. Yes, we done some work there for Joe Blackard on his back bar and remodeling the front of the building.

Q. Did you do any work for Larry Starns?

A. No.

Q. Now, did you ever send a bill to Mr. Humphries for your work? A. Yes.

Q. Do you know whether or not he ever received it?

A. Why, yes, he must have received it because he called us up and we questioned some things on the bill and I had the foreman who was on the job go down there with me and he talked to Mr. Humphries about it and the foreman pointed out to Mr. Humphries where these things went that he had questioned, formica and stuff like that that was used on the bar.

Q. Back—by "bar" you are referring to the restaurant counter, are you?

A. To the restaurant, yes, to the counter.

(Testimony of Harold Bliss.)

Q. Where did that conversation between you and Humphries and your foreman take place?

A. It was in the rear of the room there. We sat down at one of the tables in there and talked it over and Mr. Humphries acknowledged that the stuff was in the building that entered into the counter and had been used there.

Q. After the discussion was there any further dispute about the bill? [656]

A. There was no particular dispute about the bill, only that it was never paid.

Q. Well, were there any further questions raised by Mr. Humphries about that bill at any later time?

A. Not that I recall.

Q. How much was the bill altogether?

A. It came to \$3,005.89, I believe it was.

Q. Did Mr. Humphries acknowledge that he owed you that bill? A. Yes.

Q. Is there any doubt in your mind, Mr. Bliss, that the Mr. Humphries with whom you had that conversation is the gentleman sitting here?

A. No.

Q. It is the same man?

A. Same man, yes.

Q. And did you testify that he 'phoned you about the bill before this discussion?

A. I don't remember whether that he 'phoned or whether we called there about the bill.

Q. How long did this discussion last, do you remember?

(Testimony of Harold Bliss.)

A. Oh, I should imagine maybe ten minutes or so, it wasn't very long.

Q. Whatever happened to the bill, has any part of it been paid?

A. Yes, after we tried to collect the bill several times [657] from Mr. Humphries without any success, Mr. Blackard came to me and said he would assume the bill. We assigned it to him and he gave us a promissory note and he has paid part of it.

Q. Do you know how much he has paid on it?

A. \$1500 paid on the bill.

Q. And that was paid by Blackard?

A. By Blackard, yes.

Q. Did you have any conversation with Blackard before he offered to assume the bill?

A. Yes, I was in there one day to try and collect from Mr. Humphries and I mentioned to Mr. Blackard we were going to have to do something about this bill if it wasn't taken care of.

Q. That you were going to have to do something about the bill?

A. Yes, I mentioned it to Mr. Blackard.

Q. And what sort of thing were you talking about that you would have to do?

A. Well, we were figuring that we might have to attach the restaurant part of the building or file a lien on the building. It was plumbing and that would be subject to lien.

Q. And about how long was it after that con-

(Testimony of Harold Bliss.)

versation that Mr. Blackard offered to pay you the bill?

A. Oh, I wouldn't remember exactly, I imagine ten days or two weeks, something like that, it wasn't too long. [658]

Q. Do you recall any discussion that took place among you and Mr. Blackard and myself at my office with reference to that bill? A. Yes.

Q. Can you remember the substance of the conversation and tell it to the Court?

Mr. McCutcheon: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection is sustained unless the counsel is attempting to impeach the witness.

Mr. Cottis: No, I am not, Your Honor.

The Court: Objection is sustained then.

Q. (By Mr. Cottis): Do you have a copy of the assignment that was made by you to Blackard of the Humphries' account? A. Yes, sir.

Q. And do you have the original of the promissory note that Blackard gave to you?

A. Yes, sir.

Q. Do you have them with you?

A. Yes, sir.

Q. May I see them? Have these been in your possession since they were signed?

A. Yes, sir.

Mr. Cottis: May I have this marked for identification. [659]

The Clerk: Defendants' Exhibit D for identification.

(Testimony of Harold Bliss.)

The Court: What is that?

Mr. Cottis: That is a promissory note, Your Honor.

Mr. Cottis: May I have this assignment marked for identification.

The Clerk: Defendants' Exhibit E for identification.

Q. (By Mr. Cottis): Mr. Bliss, referring to the promissory note which has been marked for identification as Defendants' Exhibit D, is that the promissory note which was delivered to you by Mr. Blackard at my office? A. Yes, sir.

Mr. Cottis: I offer this in evidence, Your Honor.

Mr. McCutcheon: No objection.

The Court: It may be admitted.

Mr. Cottis: Will the Court give me permission to substitute a copy for it?

The Court: Yes, a certified copy may be substituted and the original may be returned to Mr. Bliss.

Mr. Cottis: Certified by attorneys?

The Court: No, by the Clerk. The Clerk will certify to a copy. Counsel may supply the copy and the Clerk will certify to it and then the original may be returned to the witness.

Q. (By Mr. Cottis): Now, Mr. Bliss, referring to what has been marked Defendants' [660] Exhibit E for identification, that is not the original copy of the assignment is it?

A. No, that was the copy that was given to us

(Testimony of Harold Bliss.)

and the original was left with you, I believe, or Mr. Blackard.

Q. Was this copy given to you at the same time that it assigned the original? A. Yes, sir.

Q. Now, I notice that under the columns for witnesses no names are filled in but the initials R.H.C. and M.C. appear and likewise where the notary public's initials no name is filled in but the initials R.H.C. appear. I show you what purports to be another copy of it with the names filled in, and by refreshing your recollection from this other copy, can you tell me whose names appeared as witnesses on the original of the assignment?

A. From the names filled in—Ralph H. Cottis and Mary Kilroy. Ralph H. Cottis as notary public.

Q. Is that your recollection with respect to the original assignment, Mr. Bliss?

A. I remember your signing it and I believe that the secretary or one in the office there—girls—signed it. I didn't know what her name was.

Mr. Cottis: Your Honor, I have been unable to produce the original copy of that assignment although I have searched my file diligently and I would like to offer in evidence this [661] copy which has been in Mr. Bliss' custody.

The Court: I think, counselor, it will be necessary to have some sworn testimony. Your statement—while I do not personally question your statement, it would be out of order upon the testi-

(Testimony of Harold Bliss.)

mony of this witness now to submit a copy unless counsel stipulates that it is a true copy and may go in.

Mr. McCutcheon: No, I don't wish to stipulate as to a copy, Your Honor.

The Court: I think there must be sworn proof that the original cannot be found.

Mr. Cottis: Well, perhaps Your Honor would swear me when we are through with Mr. Bliss.

The Court: Very well. Is counsel sure that the original is not in some of the files in this case?

Mr. Cottis: No, I am not. I have gone through them twice and I have not seen it, but I have a recollection of having seen it a few days ago in one of the Court's files and it might be that I overlooked it.

The Court: I recall seeing something but it may well have been what is purported to be a copy.

Mr. Cottis: There is a copy in one of the files.

The Court: That is probably what I saw.

Mr. McCutcheon: May I see the copy?

The Court: Yes, certainly, you may examine it.

Q. (By Mr. Cottis): Mr. Bliss, how long have you been in business in Anchorage?

A. Since '21.

Q. Now, what happened to the Anchorage Insulation bill for plumbing?

A. We had to pay it.

Q. That is, Bliss Construction Company had to pay it?

A. Yes.

(Testimony of Harold Bliss.)

Q. In other words, Anchorage Insulation was a subcontractor on the job?

A. Yes, they would be in that.

Q. And that has been paid? A. Yes.

Q. Was there ever any complication, Mr. Bliss, in doing the work for Mr. and Mrs. Campbell—in doing the work for Humphries and in doing the work for Blackard—was there ever any complication as to what work was being done for whom?

A. No, nothing very serious. There was something I believe at the time—had to straighten it out—which was going to pay for which item, that is, between Blackard and Mrs. Campbell, I believe was the only question that was raised.

Q. And did the question between Blackard and Mrs. Campbell get straightened out?

A. Yes.

Q. There was never any question about the work that was done [663] for Humphries?

A. Not that I know of.

Q. Do you recall what of your men were on the job down there?

A. Mr. Schroeder was the foreman and one of the carpenters was Arden Bell. I believe Frank Worden was one carpenter that worked there. I can't recall all of them.

Q. Is that all you can recall right now?

A. I think that is all that I could be sure of.

Q. Now, can you recall what rates—what hourly rates—your company paid Anchorage Installation for the work that they did for Humphries?

(Testimony of Harold Bliss.)

A. No, I don't recall just what the scale was at that particular time.

Q. Do you recall whether it was all straight time?

A. We paid the union scale, whatever the union scale was at that time.

Q. Was there any overtime connected with it that you remember?

A. I don't think we done very much overtime but the plumbers were kept on the job overtime, worked all one night there.

Q. How many of them, do you remember?

A. I think there was four plumbers.

Q. Who kept them there working all night?

A. Mr. Humphries.

Q. And do you remember what hourly rates they charged for that work? [664]

A. Well, goes double time for whatever the rate, I don't remember.

Q. Can you remember within a couple of dollars an hour what the rate was?

A. I think the straight charge was \$4.50, that would make it \$9 or \$10, something like that would be the charge per hour.

Q. \$9 or \$10 per man per hour? A. Yes.

Q. And, again, who was it who kept the men there working at night?

A. Mr. Humphries had these men work there.

Q. And that is part of the bill that Bliss Construction paid, is that right? A. Yes, sir.

Mr. Cottis: Your witness.

(Testimony of Harold Bliss.)

Cross-Examination

By Mr. McCutcheon:

Q. Mr. Bliss, you say that you didn't do any work for Mr. Starns, is that correct?

A. That is correct.

Q. It was for Mr. Blackard?

A. Mr. Blackard, yes.

Q. Mr. Blackard, you did business with him, did you?

A. Done—we done the work for Mr. Blackard on his back bar and put in the front of the building. [665]

Q. That was for Mr. Blackard? A. Yes.

Q. Mr. Starns never had anything to do with that?

A. We had no dealings with Mr. Starns whatever.

Q. None whatever?

A. Not on that building.

Q. Is your memory clear on that?

A. Yes.

Q. Would you recognize your bookkeeper's handwriting, Mr. Bliss?

A. I wouldn't know about that.

Q. What is your bookkeeper's name?

A. Why, Miss Clay is the present bookkeeper.

Q. What was your bookkeeper's name in 1948, March, April, and May?

A. Mary Moore was bookkeeper at that time.

(Testimony of Harold Bliss.)

Q. I hand you a piece of paper, do you see Mary Moore's name on that piece of paper?

A. Yes.

Q. What is that piece of paper?

A. It is one of our billheads.

Q. And who is it directed to?

A. Panhandle front.

Q. And who else?

A. Blackard and Starns. [666]

Q. I hand you another piece of paper and ask you to tell me what that is?

A. These are invoices?

Q. And who are they directed to?

A. Panhandle Bar, Blackard and Starns, but all of our dealings was with Blackard.

Q. I hand you another piece of paper and ask you what that is?

A. That is an itemized list of all the invoices.

Q. And who is it directed to?

A. It is directed to Blackard and Starns.

Q. Mr. Bliss, is that your handwriting at the top of that page? A. Yes.

Q. And is that a part of the invoice that is directed to Blackard and Starns?

A. That would be a part of the list.

Q. Did you ever have occasion to do business with Mr. Glen Phillips?

A. The only thing that I ever had to do with Glen Phillips was I called there in regard to payment on the building that Mr. Blackard and Mr. Phillips made a payment of \$250 on.

(Testimony of Harold Bliss.)

Q. On this account? A. Yes.

Q. Then you had some business dealings with Mr. Phillips? [667]

A. That was several months after the time—at the time we done the work I never even known Mr. Phillips or that he had anything in connection with the bar.

Q. Did you at that time learn that he was connected with the bar? A. I beg your pardon?

Q. Did you at that time when he made the payment on the bill that was originally charged to Mr. Humphries, did you then know that Mr. Phillips was connected with the bar?

Mr. Cottis: I object, counsel is testifying again.

Mr. McCutcheon: Well, I don't believe I am, Your Honor.

The Court: I didn't understand the answer of the witness as to the circumstances under which he received the \$250. The witness gave no testimony that this was Humphries' bill and therefore the objection was sustained.

Q. (By Mr. McCutcheon): You stated that Mr. Phillips and Mr. Blackard made a payment on a bill, did you not, Mr. Bliss?

A. Mr. Phillips made the payment on the bill that Mr. Blackard had given this note on.

Q. And that was the bill that was originally charged to Mr. Humphries, was it? A. Yes.

Q. And did you then know that Mr. Phillips was connected with that business? [668]

(Testimony of Harold Bliss.)

A. He mentioned it at the time that he was one of the partners in the business.

Q. You understood that because he paid part of the bill, isn't that correct?

A. I understood from talking with Mr. Phillips that he was one of the partners.

Q. Mr. Bliss, will you tell me what this article is?

A. This is a check for \$500.

Q. And who signed the check?

A. Signed by Glen E. Phillips.

Q. And was it at that time that you just mentioned a moment ago when Phillips and Blackard paid you a part of the bill?

A. No, sir.

Q. That is at a different time?

A. Well, Phillips is evidently has sent in this check. It was sent in through the office. I wouldn't know about all the checks that come through who signed them.

Mr. Cottis: May I see the check?

Mr. McCutcheon: Well, I haven't offered it in evidence, if the Court please, but I have no objection to counsel seeing it.

Mr. Cottis: Thank you.

Mr. McCutcheon: May I have just a moment, Your Honor?

The Court: All right.

Q. (By Mr. McCutcheon): Again, Mr. Bliss, will you tell me what this is?

A. That is an itemized list that is made from the invoices.

(Testimony of Harold Bliss.)

Mr. Cottis: What is your answer?

The Witness: It is an itemized list that was taken off from the invoices to show just what material and labor was furnished at the Panhandle Bar.

Q. (By Mr. McCutcheon): And that is directed to Blackard and Starns, is it?

A. It is assigned to Blackard and Starns, although all of our dealings was with Mr. Blackard.

Q. I understand that. That is your signature on the second page, is it not? A. Yes.

Mr. McCutcheon: I would like to offer that article in evidence.

The Court: Will you show it to counsel for the defendants?

Mr. Cottis: Your Honor, I have no objection if Mr. McCutcheon will offer all of these items in evidence but to this single item I object on these grounds: (1) I fail to see the relevance; (2) It is partly illegible; and (3) There has been no testimony about the custody of this document. I don't know where it is produced from. If he will put them all in evidence I have no objection.

Mr. McCutcheon: If counsel will wait with his objection I will get there. [670]

Q. Mr. Bliss, I again hand you——

The Court: Wait, is counsel prepared to offer all of these papers in evidence?

Mr. McCutcheon: Yes, sir.

The Court: That seems to remove one objection, and the others are overruled.

(Testimony of Harold Bliss.)

Mr. Cottis: Your Honor, I wasn't referring to all of those papers. I was referring to these other documents which he has been questioning Mr. Bliss about.

The Court: My question was directed to that. Do you intend to offer all of these?

Mr. McCutcheon: I now make the offer.

The Court: They may all be admitted.

Mr. Cottis: May I see the other ones—the checks?

The Court: Yes.

Mr. McCutcheon: Did Your Honor mean this sheet of articles or papers or all that I held in my hand, sir?

The Court: No, will you show those to counsel? It is my understanding that counsel for defendants said he would have no objection if all the papers were offered in evidence?

Mr. Cottis: All of the papers that have been shown to Mr. Bliss, including the checks?

The Court: Yes.

Mr. Cottis: And the other checks.

Mr. McCutcheon: That was the only check shown, counselor. [671]

Mr. Cottis: Very well.

The Court: Without objection all of these papers are admitted in evidence and may be marked.

Q. (By Mr. McCutcheon): Mr. Bliss, is that the check I showed you a moment ago?

A. Looks like it, yes.

Q. Did I show you any other check?

(Testimony of Harold Bliss.)

A. No, sir.

The Court: First paper offered will be marked Plaintiff's Exhibit No. 19 and the others that follow in their regular sequence. First paper is a three-page document. What was No. 20 supposed to be—a check?

Mr. McCutcheon: No. 19 purports to be a job sheet, Your Honor.

The Court: Could that be called an invoice, Mr. Bliss or is an invoice something else?

The Witness: An invoice is something else.

The Court: That is a job sheet?

The Witness: Job sheet is just a recap of the invoices.

Mr. McCutcheon: No. 20 is a check payable to the Bliss Construction Company signed by Glen Phillips, Your Honor. 21 is a statement directed to Blackard and Starns.

The Court: Has the witness testified to that? I think it should be shown to the witness.

Mr. McCutcheon: The witness has testified. I assume [672] I have the right to read it to the Jury, Your Honor?

The Court: Surely.

Mr. McCutcheon: It is entitled "Statement."

The Court: What is 22?

The Clerk: 22 is the Bliss Construction Company.

The Court: If there is any doubt the witness should testify.

(Testimony of Harold Bliss.)

Q. (By Mr. McCutcheon): Mr. Bliss, will you state what those papers are, please?

A. They are invoices.

The Court: Is that all or is there a 23?

Mr. McCutcheon: There are four exhibits, Your Honor.

Mr. McCutcheon: I would like to know if counsel will stipulate that they may go to the jury without reading?

Mr. Cottis: May I seem them again? Your Honor, I will stipulate that they do not need to be read to the Jury.

The Court: Very well. How many are there? What is the last one?

The Clerk: 22, Your Honor. That is a packet of invoices.

Mr. McCutcheon: No further cross-examination.

The Court: Any further direct examination?

Redirect Examination

By Mr. Cottis:

Q. Now, Mr. Bliss, referring to Plaintiff's Exhibit 22, which is a sheaf of invoices here, I would like to know whether [673] the yellow color has any significance?

A. The yellow color is the duplicate copy.

Q. And according to your office procedure what happens to its duplicate copy?

A. Duplicate copy is the one that is sent out—that is mailed to the customer.

(Testimony of Harold Bliss.)

Q. What happens to the first original copy?

A. The original copy is kept for our own records.

Q. In your office, then, would you have the first copy of each of these invoices?

A. I think so.

Q. Would you also have in your office the original copies of any invoices that were made out to Humphries?

A. Yes, sir.

Q. I hate to impose upon you, Mr. Bliss, but could you bring those down to the Court this afternoon?

A. It may take sometime to look them up, I don't know, it has been sometime ago.

Q. Would you have them by next Tuesday?

Mr. McCutcheon: Next Tuesday, did you say, Mr. Cottis?

Mr. Cottis: Yes.

Mr. McCutcheon: Do you anticipate that this trial will go until next Tuesday?

The Court: If it continues over from today it is bound to go until next Tuesday if we do not finish today and I see [674] no immediate prospect of it.

Mr. McCutcheon: Well, I didn't hope to spend the 4th of July in the Court room, sir. I see counsel's point.

The Court: I feel constrained to go elsewhere tomorrow and so next Tuesday will be the next day of jurisdiction of the Court at Anchorage so far as I am aware.

(Testimony of Harold Bliss.)

Q. (By Mr. Cottis): Mr. Bliss, would it be possible to dig those things up by next Tuesday?

A. I can dig them out but I expect to be out of town next Tuesday.

Q. What did you say the name of your present bookkeeper is? A. Frances Clay.

Q. Would she be available to bring them down here? A. I think so.

Q. Will you have her do it, Mr. Bliss, by next Tuesday. That is, your office original copies of Plaintiffs' Exhibit No. 22, which is comprised of invoices bearing your stamp numbers 6089, 6103, 6116, 6133, 6142, 6158, 6046, 6068, 6077 and 6136, and I will make a list of those for you, Mr. Bliss, and also your office copy, if you have one, of Plaintiffs' Exhibit No. 21?

A. There isn't any office copy of statements.

Q. There would be no office copy of this Exhibit 21? A. No. [675]

Q. In your customary procedure would there be any office copy of this Exhibit 19, which is marked Job Sheet? A. Not ordinarily, no.

Q. Would you also instruct your girl to produce anything else that she might find in connection with work done at the Panhandle whether it was for Humphries or for Blackard or for Mrs. Campbell? A. Yes.

Q. Now, Mr. Bliss, do you recognize the handwriting of the inked in words on Exhibit 22?

A. No, I couldn't testify as to the handwriting.

(Testimony of Harold Bliss.)

Q. You don't know whether it is Miss Moore's handwriting or not? A. No, I wouldn't know.

The Court: Where is Miss Moore now?

The Witness: She is outside in California, I believe.

Q. (By Mr. Cottis): Here is the list of those invoice numbers, if that will be any help to you or your office force. Mr. Bliss, can you explain how those bills, if they were so addressed, happened to be addressed to Blackard and Starns?

A. No, I wouldn't know just why they were addressed to it because all of our dealings was with Mr. Blackard. Mr. Starns was putting in a liquor store in the building at the same time and we understood from Mr. Blackard that Starns was going to [676] reimburse him for part of the front that was put in.

Q. So, as far as your relationship with either of them was concerned did Mr. Starns ever pay you any part of your bills?

Mr. McCutcheon: I would like to ask the Court to strike the testimony with reference to what Mr. Blackard told Mr. Bliss.

Mr. Cottis: He didn't testify as to what Mr. Blackard told him.

Mr. McCutcheon: Read it back.

(Answer and question put were read)

Mr. McCutcheon: That is what I object to.

The Court: Overruled.

Mr. McCutcheon: Objected to as leading.

(Testimony of Harold Bliss.)

The Court: Overruled.

Q. (By Mr. Cottis): Did Mr. Starns ever pay you any part of the bills on this work, Mr. Bliss?

A. No.

Q. Did Mrs. Campbell pay you for some of the work that you were doing at that time?

A. Yes.

Q. Did Mr. Humphries pay you for any of the work that was done at that time? A. No.

Q. Did Mr. Blackard pay you for any of the work that was done at that time? [677]

A. Yes.

Q. Were those three jobs billed separately by your office? A. Yes.

Q. That is, one appropriate bill went to Mrs. Campbell, is that correct? A. Yes.

Q. And then a completely separate bill went to Mr. Humphries, is that correct? A. Yes.

Q. And a completely separate bill went to Mr. Blackard, is that correct? A. Yes.

Q. Did Mr. Blackard or Mrs. Campbell question any items on their bills?

A. Mrs. Campbell's son questioned it a little bit and I explained to him what it was and he o.k.'d the bill and paid it. He was acting as her agent.

Q. Did Mrs. Blackard question anything on his bill? A. No.

Q. Did you ever have any discussion with Starns about this work? A. No.

Q. Did you ever have any discussions with Starns about payment for any of the work?

(Testimony of Harold Bliss.)

A. No. [678]

Q. And no payment ever was received from Starns? A. No.

Q. Do you know how these invoices that have written on them in ink "Blackard and Starns"—do you know how they were delivered and to whom?

A. No, I don't

Q. You don't know whether they were put in the mail or not? A. No, I don't.

Q. Do you know whether your office has sent to Mr. Blackard any statement of the balance owing on the Humphries' bill?

A. No, I don't know personally.

Q. The Blackard bill has been paid completely, has it, that is for the work that was done on the bar for Blackard?

A. Yes, the bar work that was done on the bar was paid for complete.

Q. And Starns paid no part of it? A. No.

Q. There is some balance owing on the Humphries' bill that Blackard has been paying off?

A. Yes, sir.

Q. And will you state again about what that balance is?

A. It would be about 1500-dollars plus interest.

Q. Since Blackard assumed that Humphries' debt to you, have you had any further discussions with Humphries about it? A. No. [679]

Mr. Cottis: No further questions.

The Court: Any further cross-examination?

(Testimony of Harold Bliss.)

Mr. Cottis: May I have just a moment, sir?

Mr. McCutcheon: No cross-examination.

Juror: Mr. Bliss, have you done any building for Starns in the past few years?

The Witness: No.

The Court: That is all, Mr. Bliss, you may step down.

Mr. Cottis: Mr. Moon.

CHARLES E. MOON

called as a witness on behalf of the defendants, having been duly sworn testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Charles E. Moon, is that right?

A. Yes, sir.

Q. Doctor Moon, what was your—during April of 1948 were you the Sanitation Officer for the City of Anchorage?

Juror: Mr. Moon was in the Court room around eleven o'clock today.

Q. (By Mr. Cottis): How long were you in the Court room this morning?

A. I don't know how long, I imagine ten minutes.

Q. Do you recall who was testifying?

A. Mr. Bliss.

Q. Have you been in the Court room during this trial at [680] any other time?

(Testimony of Charles E. Moon.)

A. One other time when I was subpoenaed Monday when I came up—was it Monday—the 22nd for about two or three minutes.

Q. Who was testifying then do you recall?

A. I don't recall.

Q. Do you remember what the testimony was about?

A. No, I don't, I wasn't paying any attention to that. I was trying to get Mr. Blackard's attention to find out what I was to do, since he had subpoenaed me.

Mr. McCutcheon: If the Court please, I would like to exercise my right to object to the testimony of the witness on the grounds that he has heard testimony heretofore. I don't know what to anticipate in way of testimony from Dr. Moon, but I would object to it at this time. The Court declared on motion of the plaintiff, myself, at the beginning of the trial the Court declared that all witnesses must be absent and remain absent and the Court admonished both counsel to make sure that their witnesses were absent from the Court room and, if the Court please, I was very diligent in that and kept all my witnesses out of the Court room, and I at this time object to the testimony of this witness on that ground.

Mr. Cottis: Your Honor, may I submit that Dr. Moon is here entirely as a Sanitation Officer and his testimony would have no connection with anything that Mr. Bliss was inquired from. [681]

(Testimony of Charles E. Moon.)

The Court: Did you hear the declaration of the Court that all witnesses should remain out of the Court room during the course of the trial?

The Witness: No, sir, I didn't.

The Court: Although the rule was made and the Court is disposed to enforce it I am unable to see that what Dr. Moon may have heard of the testimony of Mr. Bliss could in any wise affect his testimony.

Mr. McCutcheon: Before your Honor rules, I realize that perhaps there is no connection between the two, however, the Court established a rule by which both counsel are bound and I submit that it is unfair to the plaintiff to make an exception of witness for the defense.

The Court: The only exception that is made is one based upon reason that would be made impartially of course for a witness for either side and in this particular case if the witness has anything of value to offer I think it ought not be excluded by the accident——

Mr. McCutcheon: Will your Honor hear me further?

The Court: Yes, wait until I finish and I will be glad to hear counsel—that he was in the Court room—for how long did you say, about ten minutes?

The Witness: About ten minutes.

The Court: ——and heard the testimony of a witness who was testifying to another feature of the case entirely.. The [682] reason for the rule is to prevent one witness from listening to another and

(Testimony of Charles E. Moon.)

then consciously or unconsciously supporting or contradicting the testimony of the other witness. Now, I will be glad to hear Counsel.

Mr. McCutcheon: If the Court please, my motion is one privileged. The motion that was made at the beginning of this trial was one privileged by statutory law, as I remember, and the motion was made in good faith. Counsel for the plaintiff has followed the Court's order diligently in that respect and I submit, sir, that if the Court were to look into the fact as to whether or not the testimony of a witness on the stand would in any way influence the witness that was overhearing the testimony it would then be necessary, sir, for us to go into the entire merits of the thing each time a witness were called to the stand, whether it was ten minutes or two days, sir, and I restate my objection.

The Court: I think the matter is within the sound discretion of the Court and the business of the Court is to promote justice, after all. It is true that the rule is based upon the statute but I am convinced, and in this I am sustained by rulings made by Judges before Counsel before in this very Court, that the Court does have the discretion, and I have noted it to be exercised when it seems clear without any shadow of a doubt that the opposite party cannot be prejudiced, cannot be hurt, by the fact that a witness inadvertently has been in [683] the Court room and has heard some testimony. At any rate the objection will be overruled and the

(Testimony of Charles E. Moon.)

witness will be permitted to answer. And, of course, in this, as in every other case, an exception is taken as of course. Counsel may proceed.

Q. (By Mr. Cottis): Dr. Moon, in April of 1948 were you the Sanitation Officer for the City of Anchorage? A. Yes.

Q. In connection with your duties as such Sanitation Officer did you have occasion to visit the Panhandle Bar and Cafe during April or May of that year? A. Yes, I did.

Q. Do you recall what date it was?

A. No, I don't know the exact dates. It was short—as I remember the Panhandle was shut down for a period of time and remodeled and after they remodeled it was shortly—it was while they were remodeling that I visited it several times and shortly after that.

Q. And did you ever visit it after it had opened? A. Yes, I did.

Q. Will you describe what conditions you found?

A. Well, when they opened it it was in a pretty fair condition, that is, from a sanitary standpoint, and the longer it opened it run down quite fast, that is, and the condition of the premises got progressively worse. [684]

Q. Did you ever have to take any drastic action with respect to the premises?

A. Well, it was always my policy when I was Sanitarian to never take any drastic action on any establishment unless I had first given the operator

(Testimony of Charles E. Moon.)

sufficient time to clean up the place and get it into a good sanitary condition.

Q. On that connection did you have any discussions with the operator of the Panhandle Cafe at that time?

A. Yes, I talked with Mr. Humphries and pointed out what he was doing wrong and made the suggestion that he clean them up and get them straightened around.

Q. And was that done?

A. Well, he seemed to be the type of an individual that would——

The Court: Answer the question, Doctor.

The Witness: Well, he would clean them up if he saw me coming; in other words, if he didn't think I was going to be there it wasn't in too good a shape and when I would let him know that I was coming he would have it in pretty good order.

Q. (By Mr. Cottis): Did there ever come a time when you had to condemn anything on the premises?

A. Yes.

Mr. McCutcheon: Objected to as leading. [685]

The Court: Overruled.

The Witness: Yes. Yes, I did, one night I did after Mr. Blackard evidently was having some trouble and he was quite concerned about the fact that the restaurant part be kept in a good, sanitary condition because he was operating the bar just adjacent to it. And he called me one evening about 8:30, as I remember, and asked me if I would

(Testimony of Charles E. Moon.)

come down and check over the restaurant part of the Panhandle and I went down and at that time I found quite a number of food particles that were in very bad condition.

There was liver there—three or four pounds of liver—that had micrococci the size of a dollar and larger that were green-yellow. Now whether Mr. Humphries was using that to feed or was serving that or not I don't know, but if he wasn't he had no right to have it in an establishment like that.

Also there were some calves brains that had stood around without proper refrigeration in storage that had liquified. They were no longer solid. They were in a gelatinous state. Those were the two things that impressed me most—that was the liver and the brains.

Then at that time the premises in general were in a very poor condition, that is, from a sanitary standpoint it was, things weren't clean at all—refrigerators were dirty, looked as though they hadn't been cleaned in two or three days. The shelves were the same. [686]

Flour bin had mouse droppings in it as did the sugar containers, and in general it was in very poor shape. And at that time because of the condition and because of the previous warnings that I had given Mr. Humphries, I closed the place and I took the foodstuffs that I had condemned or taken out of there—the brains and the liver—I took them out to the City Dump and burned them. I went

(Testimony of Charles E. Moon.)

right out and saw to it that they were destroyed and not used for any other purpose.

Q. (By Mr. Cottis): Now, subsequent to that time did any other operator take over the restaurant?

A. You mean after that?

Q. Yes.

A. Yes, there was another fellow that took it over, it was about two to three weeks after that that he got it cleaned up in shape where I would allow him to open it.

Q. Did you delay his opening?

A. Yes, I did, they wanted to open it as fast as they could so that they could start operating and I wouldn't allow it to be opened until such a time as it was in a clean condition.

Q. Do you recall how long the new operator was delayed?

A. About three weeks.

Q. What did he have to do to the premises to meet your approval?

A. Well, in the back toward the alley on the restaurant side [687] they had to repair the roof. There was an open space going between the refrigerator or the cold box to the restaurant, and it was open to the air and the elements and the rain was dripping down through there so that when it did rain anytime anybody would walk between one place to another there would be drops—rain drippings—from off the roof that had a very good chance of falling down on food that was being carried.

(Testimony of Charles E. Moon.)

Q. Anything else that you can recall?

A. He had to scrub up, I know—clean things down quite a bit. I don't know just what the major other repairs he might have done.

The Court: I think we had better suspend until two o'clock.

Under the law I am compelled to remind you every time you separate that you must not discuss the case among yourselves or with others or listen to any conversation about it and that you must not form or express an opinion about it until it is finally submitted to you. You may now retire and Dr. Moon may step down, and report back at two o'clock.

(Whereupon, at twelve o'clock noon the taking of testimony was recessed until two o'clock p.m. the same day.) [688]

Afternoon Session

The Court: Clerk will call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Dr. Moon may resume the witness stand. Counsel may proceed with the examination.

CHARLES E. MOON

previously called as a witness on behalf of the defendants, having previously been sworn testified as follows:

(Testimony of Charles E. Moon.)

Further Direct Examination

By Mr. Cottis:

Q. Doctor——

Mr. McCutcheon: If the Court please, Dr. Moon asked me a moment ago if he should take the witness stand before your Honor came in and I told him yes.

The Court: That was quite correct. Counsel did not know that another matter had been scheduled for hearing, so it is quite proper for the Doctor to take the witness stand. Counsel may proceed with the examination.

Q. (By Mr. Cottis): Dr. Moon, when you were Sanitation Officer for the City did any custom exist in your office with regard to written reports?

A. Yes, sir.

Q. What was the custom? [689]

A. Any time we made an inspection I also made a written report on that inspection and kept them in the office.

Q. Now, do you have any inspection reports on your inspections of Mr. Humphries' restaurant at the Panhandle?

A. When I got the subpoena with regard to this case I went down to the Health Center to pick those inspection forms up so as to refresh my memory and they weren't there. I don't know what happened to them. They weren't in the files at all. The only inspection form that was down there on the Panhandle was the one that I made after Mr.

(Testimony of Charles E. Moon.)

Humphries had left and Jack Guard had taken over.

Q. None of the Humphries' inspection reports were down there?

A. None of them were, no.

Q. Has anything of that nature ever occurred before in connection with inspection reports, so far as you know?

A. Not so far as I know.

Q. Did the City have a grading system for restaurants at the time you were Sanitation Officer in April and May of 1948?

A. Yes.

Q. Could you tell us briefly what that grading system was?

A. Well, it was the grading system that is recommended by the United States Public Health Service grading restaurants, either Grade A or Grade B or Grade C.

Those in a Grade A classification were those that came up to all of the standards of the grading code.

Those in Grade B came up to all the standards with the exception of a few minor violations and Grade C just about anything went.

Q. Now, was Mr. Humphries' restaurant graded?

A. No, I went—called, or I am not sure whether or not called or Mr. Blackard, but someone from the Panhandle called and wanted the Panhandle Bar inspected to be graded and it never was—it never came up to any of the standards. In putting

(Testimony of Charles E. Moon.)

out these when I was grading them I thought it would be probably fair to the operators of these eating and drinking establishments before I put out any grade cards I first inspected them to give them an opportunity to come up to the Grade A standards before putting a Grade B or Grade C card in their restaurant or bar, whichever it happened to be, and the Panhandle Bar was never graded. That is, it was never given a grade card.

Q. Was that the bar or the restaurant?

A. That was the restaurant.

Q. To the best of your recollection how frequently did you inspect the Panhandle restaurant?

A. Well, at that particular time shortly after Mr. Humphries took charge of the Panhandle I was inspecting it quite frequently because previously he had operated the Mess Hall down in the railroad—for the railroad, and I had myself and Mr. Morley, the Territorial District Sanitarian, had inspected that [691] railroad mess hall and we had had to close it up and Mr. Humphries was operating that one because of that. I thought that if he were to operate a restaurant herein town I wanted to make sure that it were operated in a sanitary condition if it were possible at all. So I was making fairly frequent checks on it.

Q. Was it the sanitary conditions that prevailed at the railroad that led to your closing of that or some other conditions?

A. It was the sanitary conditions, yes.

(Testimony of Charles E. Moon.)

Q. Doctor, at the time you condemned these foods of Humphries' at the Panhandle Restaurant in May did you have any discussion with Humphries?

A. Yes, as I remember now it was about 8:30 when—between 8 and 8:30 when Mr. Blackard came out and asked me if I would go down and check it. And I was down and went over everything and picked out those perishable foods that were decomposed to the extent that they were unfit for human consumption, and we had loaded them onto the pickup to take them out to the dump to burn and Mr. Humphries came in, and I had went back inside into the restaurant part of the building, and Mr. Humphries asked me if I would step out in the alley and talk to him about it and we went out and he was pretty upset because he was cursing and using quite a bit of profanity and we went out and was telling me I had no right to take that food and throw it away, that he had had someone—I don't know who it was, but [692] he had had someone—check that food not too long before I was there and they had said it was in good condition. Who that was I don't have no idea, it was nobody with any authority to do it so far as I know because I checked with the rest of the Health Department officials and I know they wouldn't have done it.

Q. That is, somebody, according to Humphries, had inspected it that same day before you were there?

(Testimony of Charles E. Moon.)

A. Yes, he had said, as I remember, it was only within two or three hours.

Q. Was it anybody connected with the United States Marshal's office, do you recall?

A. Well, I don't know whether it was or not but he asked me if I would go down with him and see the Marshal at that time, and we were talking back and forth and I couldn't see too much reason for me to go down and see the Marshal and we were about to get into his car when the City Police came over and they started questioning him.

Q. Did they search him?

A. Well, they did, they got into the car and they went to open the car door and there was some scuffling and as I remember they got a hunting knife out about so long and they were talking to him and then the next thing I knew the car that Mr. Humphries and four or five other men in the car also, maybe not that many, two—one in the front seat and two in the [693] back seat, as I remember, and the car left and went down the alley and left the police standing there wondering what they were doing, I guess.

Q. Did Mr. Humphries make any threats against you?

A. No, nothing other than just cursing.

Q. Did you see any card tables in operation in the Panhandle premises when you inspected Mr. Humphries' restaurant from time to time?

A. Well, I wasn't looking for any card tables.

(Testimony of Charles E. Moon.)

Now there might possibly have been some card tables as you go into the restaurant or into the restaurant off to the left in the rear, there may have been one or two but I never noticed anybody ever playing cards in there.

Q. Were there any card tables at Humphries' restaurant down at the railroad?

Mr. McCutcheon: Objected to as immaterial.

The Court: Sustained.

Q. (By Mr. Cottis): Was any canned milk condemned that you recall?

Mr. McCutcheon: Objected to as leading.

The Court: Overruled.

The Witness: Is it all right to answer?

The Court: You may answer.

The Witness: Yes, I did take out some canned milk—three or four cans that they had been opened and had been [694] evidently opened for quite a number of days, but that is all, just cans that had been opened is all.

Q. (By Mr. Cottis): Will you tell the Court again what meats you can now recall that you had to condemn or that you did condemn?

A. Well, two types of meat that I remember most distinctly, of course, were those in the worst condition and that was the liver and the brains, and there were also several chicken carcasses that I threw out that were in very poor condition, I mean, in such condition you couldn't get very close to them. You could really get a good smell of them

(Testimony of Charles E. Moon.)

and then there was some corn beef, about 30 pounds of corned beef, and that wasn't in too bad a condition. It had been thrown down on the floor and had dirt on it or had been laying on the floor. It had quite a bit of dirt and I didn't feel that there was any need of taking chances of that being washed off and being fed to someone.

Q. What was the general condition of the restaurant at that time as to cleanliness as to equipment?

A. At that time it was in very poor condition.

Q. What was the condition of refrigerators as to cleanliness?

A. That is where I got some of the foodstuffs was from the refrigerator and the refrigerators weren't in good operating condition, they were very poor, and they didn't look like they had been cleaned out for a week or ten days maybe. [695]

Q. What was the condition of his stoves or ranges as to cleanliness?

A. Well, the stove that they had it was an accumulation of grease behind it that I had mentioned to Mr. Humphries on previous inspections that had never been taken care of and there was a lot of grease that had splattered on the back walls and around the range and onto the floor and been worked in.

Q. And you say that condition had been brought to Mr. Humphries' attention? A. Yes.

Q. Where was it that you found miscellaneous droppings?

(Testimony of Charles E. Moon.)

A. In a barrel that he had some—not a barrel but a drawer that he had his flour and also in some of his sugar.

Q. Who was it made the inspections with you at the railroad messhall?

Mr. McCutcheon: Objected to as immaterial.

The Court: Objection sustained.

Mr. Cottis: Your Honor, counsel did not object before.

The Court: He objects now.

Mr. McCutcheon: I think that counsel would be honorable enough to stay away from that subject and knows that it was immaterial.

Mr. Cottis: Your Honor, I ask that that be stricken from the record.

The Court: It may be stricken. [696]

Q. (By Mr. Cottis): Did you have any conversations with Mr. Humphries or Mr. McCutcheon after the closing—after the condemnation of those meats regarding that subject?

A. Yes, the next day or two following, Mr. McCutcheon called and wanted to know what I had thrown out down there, that Mr. Humphries told him it was quite a loss and quite a bit of valuable meats and other foodstuffs. So I went up and talked to Mr. McCutcheon about it and told him what the circumstances were surrounding it and I had a list of all of the foodstuffs that I had thrown away, but I had no idea where is that now.

Mr. Cottis: No further questions.

(Testimony of Charles E. Moon.)

The Court: Counsel for plaintiffs may examine.

Cross-Examination

By Mr. McCutcheon:

Q. Dr. Moon, how long had you been engaged by the Territorial Department Health Service?

A. In August or September of 1947.

Q. And you are now engaged in private Veterinary practice here in Anchorage, are you not?

A. Yes, sir.

Q. Now, you have no particular feelings either one way or the other in this case, have you, Doctor?

A. No.

Q. Now, when you testified that you closed the restaurant, [697] you meant that you ordered that the restaurant could no longer operate, isn't that correct?

A. That is right.

Q. And you were informed, were you not, that the restaurant had been closed for several days at the time of your inspection?

A. I found out later, yes, that Mr. Humphries had been operating the restaurant and that the reason that Mr. Blackard wanted me to come down and inspect it was so that I could throw out any foodstuffs that weren't fit to eat, because he wanted somebody else to take over the restaurant the following Monday.

Q. Yes. Now, the meats that were spoiled were not under refrigeration, is that correct, they were thawed?

A. That is right, yes.

(Testimony of Charles E. Moon.)

Q. Now, do you know who removed them from the freezing compartment?

A. No, I had no idea. I do know that the brains—calves brains—couldn't have gotten in that condition in less than four to five days, I mean they had to be out that long to——

Q. Now, you mentioned that your records had disappeared. Where had your records been kept?

A. They were in the files in the Sanitarian's Office at the Health Center.

Q. And when did you last have occasion to look for those files?

A. The last time I looked for them was the morning of the [698] 22nd or the afternoon of the 22nd.

Q. 22nd of June?

A. Yes, shortly after I got the subpoena.

Q. And did you have a discussion with a lady there in charge of the files with reference to the missing file?

A. No, I only asked her where the files on the Panhandle Bar and Cafe were.

Q. I am just inquiring. Did she at that time mention where the files might be?

A. No, she didn't say anything to me.

Q. Did she mention who had been up to see the files? A. No.

Q. Do you know the lady's name, Doctor?

A. Yes.

Q. May I have her name please?

(Testimony of Charles E. Moon.)

A. It is Mrs. Powell.

Q. But there should have been in those files a complete record of the Panhandle premises, is that not correct?

A. That is right, there should have been a record of all inspections I made.

Q. Now, besides the record of the Panhandle Restaurant would be the record of other matters found such as the condition of the rest rooms?

A. That is right.

Q. And there was something wrong with the condition of the [699] rest rooms, was there not?

A. Yes, when I first made my——

Mr. Cottis: Objected to as immaterial, your Honor.

The Court: Objection is sustained.

Mr. McCutcheon: Very well, sir.

Q. Now, let me ask you another question, Doctor, on that report would be your report of the condition of cuspidors around the card tables, would there not?

A. Well, there would have been report of the—I would have written in and as I remember I did remark about the uncleanness of the cuspidors that were just outside the toilet door.

Q. Now at the time of your final inspection, Doctor—rather, not your final inspection, but at the time you found the spoiled meat and other items that was the worse that you had ever seen the restaurant, wasn't it?

(Testimony of Charles E. Moon.)

A. Yes, that was the worse that I had ever seen the restaurant.

Q. And if that condition had occurred previously you would have closed the restaurant immediately, would you have not?

A. Depending, of course, on the—if I found it, the first time I would have condemned or taken those foodstuffs that weren't fit for eating, I would have taken them and warned the operator and made very frequent inspections following that, possibly every day.

Q. Well, your inspections prior to that time had never been [700] of such a serious nature as to warrant closing the restaurant, had they?

A. No, not to close it, no.

Q. But the condition that you found it finally there was certainly sufficient to warrant closing the restaurant, wasn't it?

A. That is right.

Q. And you did order that the restaurant couldn't again open, did you not?

A. Yes, I told them—Mr. Blackard was interested in opening up the restaurant the following Monday under someone else's management and I told them that it would be opened up as soon as it was ready to be opened in a clean condition and not until then.

Mr. McCutcheon: That is all.

(Testimony of Charles E. Moon.)

Redirect Examination

By Mr. Cottis:

Q. Do you recall the date of your visit?

A. No, I don't know what the dates were. Now that was all written down on those inspection forms.

Q. I mean the last one?

A. The last one?

Q. No, I don't—this incident when you found the brains and the liver you said you took them and burned them? A. Yes. [701]

Q. Had you previously made a visit there and condemned meat and poultry to get rid of it?

A. No, I never condemned any meat previously at the Panhandle.

Q. Well, was there any meat that you condemned but did not take with you that night? Did you just take the brains and the liver or did you load some on a truck?

A. Yes, we loaded all of the foodstuffs that I considered unfit for human consumption onto a pickup truck and took them out to the dump out by Merrill Field and burned them.

Q. I see, you, personally?

A. Yes, I personally did. We took some oil and poured over them out there.

Q. And the United States Marshal didn't come and stop you from doing that?

A. No, I didn't see the Marshal at all, not any time.

(Testimony of Charles E. Moon.)

Q. In the course of your inspection are you concerned with the licenses or permits?

A. The licenses and permits of the City at that time were in a poor state of affairs in that only about one restaurant in nine or ten had a permit to operate. I don't know just who was lax about it but they didn't have the permits. Most of them had permits from the Territory to operate but the City license or permits, as they were called, which was, they had a dollar permit fee. Very few of the restaurants had those permits. [702]

Q. But in your inspection when you were making out a report you would check those too?

A. No, not necessarily, I was concerned primarily with the sanitary condition of the establishments not whether they had permits to operate.

Q. Previous to the time you escorted the meat to the dump pile did you make an inspection and mention that some of the meat should be gotten rid of?

A. No, I had never told them that the meat should be gotten rid of. I had mentioned in several instances that the refrigerator wasn't working as it should be but had never actually told him he should get rid of some of the meat.

Q. That was the refrigerator on the main floor back of the——

A. Yes, that is right.

Q. How many trips did you make—one or two?

A. Where?

Q. At the time you took the meat, had you made a trip there very shortly before that?

(Testimony of Charles E. Moon.)

A. Now, you mean, had I inspected the place?

Q. Yes.

A. I can't just remember how long before it was that I had inspected it, it wasn't much over a week, in fact, I think it was four to five—about six days previous to that.

Q. You hadn't made one in between, say, five days?

A. No, it wasn't that— [703]

Q. Close?

A. —close, it was at least six days, possibly longer. As I say I can't remember. If I had those inspection forms I would have the dates right for you but I don't know what happened to those.

Q. Did you inspect it—

A. At what time?

Q. —just before Mr. Humphries opened it?

A. Yes, he came down and asked me if I would go over and inspect it. He wanted to open it the following day and I went down and looked it over and at that time there were a few things that still needed to be done but he was quite anxious to open and get started so I told him to go ahead as long as he did clean and straighten things up and he was quite lax about doing that after he had been opened.

Q. Were some of those things from the people who had it before?

A. No. No, of course, some of the equipment, of course, was still there and other things that were, part of them no doubt was from the same previous.

(Testimony of Charles E. Moon.)

You see, the toilet facilities and lavatory facilities were particularly something that had to be straightened up.

Q. You no doubt inspected the meat room where the freezer was in the back? A. Yes. [704]

Q. Were the walls covered in any manner besides just finished off?

A. No, they were covered with wood and after Mr. Guard started operating he covered them with aluminum, because I remember it was aluminum that the walls were covered after it had been closed and after Mr. Humphries was through operating.

Q. But before that time during Mr. Humphries' stay in the restaurant they were just wood?

A. I believe they were just wood covered, yes.

Q. What about in the back of the counter on the wall there?

A. In the back of the restaurant counter?

Q. The back of the restaurant counter—the wall?

A. I don't know what type of covering it was but it didn't make too much of an impression in my mind at the time.

Q. Is there any certain covering recommended to make it easier to keep clean?

A. Stainless steel or a metal covering is the easiest to keep clean.

Q. And you can't recall whether that was there or not? A. No, I can't.

The Court: I think that is all, Dr. Moon, you may step down. Another witness may be called.

Mr. Cottis: Mr. Spradlin.

WILLIAM G. SPRADLIN

called as a witness for the defendants, having been duly sworn, [705] testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is William G. Spradlin?

A. Yes.

Q. What is your occupation?

A. Painter.

Q. Were you subpoenaed to come here to testify?

A. Yes, sir.

Q. And by whom?

A. Mr. Humphries or Mr. McCutcheon.

Q. Will you sit nearer to the microphone, please, Mr. Spradlin? Now, on February, 1948, did you have any dealings with Joe Blackard with respect to the Panhandle premises?

A. I did the painting there.

Q. Will you explain what you mean, did you do all the painting?

A. I was the contractor on the job, I was in charge of hiring the men and seeing that it was done right.

Q. You were the contractor for what portion of the work?

A. Just the painting—the painting alone, and papering, of course.

Q. And papering?

A. Yes, sir.

Q. Was it your responsibility to do all the painting and [706] all the papering for the premises?

(Testimony of William G. Spradlin.)

A. That is the way I understood it.

Q. What sort of agreement did you have with Blackard?

A. It was time and material.

Q. And did you do all of the painting and paper hanging?

A. As far as I know I was in charge of it.

Q. Did you have any dealings with Mr. Humphries in connection with that work?

A. Well, yes. Mr. Humphries asked to go to work as a journeyman and I told him it was o.k., and someone hung papers at night when I was gone and we took that up with our union and he was a part owner or lessee or something and he worked or someone did the work, who it was I don't know. They did it nights after I was left. Mr. Humphries came in in the morning and said "Well, I can help you today" and he would get busy doing something else or go away and that was—didn't get no work out of him during the day but someone hung some paper and things during the night.

Q. How much paper was hung at night as nearly as you can recall?

A. The best I could say, there would not be over ten hours—eight or ten hours, what time it would take to do it.

Q. Was the job satisfactory, the work that was done at night?

A. Some of it was and some wasn't.

Q. Can you remember what proportion was and what proportion [707] wasn't?

(Testimony of William G. Spradlin.)

A. Not exactly. I know of three strips we had to cover up and some we had to tear off that didn't stick, but who did it I couldn't swear.

Q. Did you ever see Humphries do any paper hanging around the premises?

A. Not actually myself.

Q. Did you ever see Blackard do any paper hanging around the premises? A. No, sir.

Q. Did you ever see Phillips do any paper hanging?

A. No, sir, I know someone did it though.

Q. Did you put Mr. Humphries on your payroll after he had applied for this job?

A. I did and then he never worked that I saw, so I couldn't keep him on the payroll.

Q. Now, who paid for the materials that went into the job so far as you know?

A. So far as I know Mr. Blackard did.

Q. Did Mr. Starns pay for any of them that you know of?

A. Not that I ever saw or heard of.

Q. Did Mr. Phillips pay for any that you know of? A. Not that I know of.

Q. Did Mr. Humphries pay for any that you know of? A. No, sir. [708]

Q. Did Mr. Campbell pay for any that you know of? A. No, sir.

Q. Have all your bills on that job been paid?

A. Yes, sir.

Q. Who paid them? A. Mr. Blackard.

(Testimony of William G. Spradlin.)

Q. And your job was to do the complete painting and paper hanging of the premises, is that correct? A. Yes, sir.

Q. Now, did you ever sit in on any card games in the Panhandle? A. Yes, sir.

Q. How often? A. Twice.

Q. Can you recall whether or not those games were before April 1st?

A. Well, I wouldn't swear to the date but it was before every place else in town was operating. The games were all over town.

Q. They were all over town? A. Yes, sir.

Q. Did you recall anybody else sitting in either of those games with you?

A. Well, I only know——

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled. [709]

Q. (By Mr. Cottis): I am sorry, I didn't catch your answer?

A. I only know two of the people and I don't know one of their names. One was Mr. Humphries and I don't know who the other——

Q. Was one Mr. Humphries? A. Yes.

Q. Who played in one of these card games with you? A. Yes, sir.

Q. How long did Mr. Humphries play cards?

A. Oh, that I truthfully couldn't say, it wasn't long though, because I went in about approximately eleven and I couldn't say just when he left but it broke up and I went home—we all went home.

Q. Did he play until the end of the game?

(Testimony of William G. Spradlin.)

A. That was the end of the game.

Q. Do you recall seeing Mr. Blackard on the premises at the time?

A. I couldn't truthfully say whether he was there or not.

Q. Did you buy any drinks while you were playing cards? A. Yes, sir.

Q. Did you use chips to pay for beer?

A. They were. Yes, we did.

Q. And you don't remember whether Mr. Blackard was there?

A. No, I truthfully couldn't say. [710]

Q. Do you remember whether Mr. Phillips was there?

A. Yes, he was, he was tending bar.

Q. Did you ever see Mr. Starns on the premises?

A. No, sir.

Q. Did you ever have any dealings with Mr. Starns in connection with the Panhandle?

A. No, sir.

Q. Have you ever had dealings with Mr. Starns in connection with anything else?

A. Yes, sir.

Q. Will you tell us what they were?

A. Well, I have been doing all of his painting since the Panhandle and Fort Starns and the 1042 Club.

Q. But you never had any dealings with him in connection with the Panhandle?

A. None whatsoever.

(Testimony of William G. Spradlin.)

Q. Did you have any conversations that you can recall with Mr. Blackard with respect to the liquor store part of the Panhandle premises?

A. Only to keep it separate, to keep that time separate and materials separate from all other work.

Q. Did you do that? A. Yes, sir.

Q. Do you recall who paid your bill for that portion of the work? [711] A. Yes, sir.

Q. Who? A. Mr. Blackard.

Q. When you played cards in the Panhandle did you observe anything as to whether the games were detrimental or otherwise to the restaurant business?

A. No, sir.

Q. Did they have any effect at all on the restaurant business that you could observe?

A. Well, if anything it would get more people in there, that I could see. I couldn't see any harm in any of it. It seems to me it would help more people to get in the better chance it would be for them to eat there.

Q. How many card tables were there in the premises? A. There were two.

Q. How many of them—how many card games did you ever see going on?

A. Two is the most I know of, that is the ones I played in.

Q. Were there two tables operating simultaneously? A. No, sir, just the one.

Q. Did you ever see more than one table oper-

(Testimony of William G. Spradlin.)

ating as a card table in there? A. No, sir.

Q. Did you ever see either of the tables used for any other purpose? [712]

A. Yes, they ate on them, they served a few meals on them.

Q. As Mr. Humphries' restaurant did?

A. Yes, sir.

Q. When Mr. Humphries applied to you for a job to do paper hanging for you, did you investigate his Union status?

A. Well, as far as the Journeymen I did.

Q. And what did you find out?

A. That he was a co-owner and could work.

Q. If he had not been a co-owner would he have been eligible to work? A. No, sir.

Q. Did you ever actually see Humphries hang any paper at all in there?

A. Truthfully I can't say that I did.

Q. Did you ever see him do any helpful work in the line that you were the contractor for?

A. Yes.

Q. What was that?

A. He got materials for me, helped me get some extra paper and equipment to use, loaned me tools and just helped various ways and even tore paper and done some pasting and he did work. Most of the time it seemed that he would get ready to work, he always had to go somewhere and he couldn't get time to work.

Q. Did Blackard and Phillips give you any help?

(Testimony of William G. Spradlin.)

A. Not the same way, they helped all they could. We were all [713] trying—doing our business to get it finished with the help that we could get.

Q. Did Humphries give you any more help than Blackard and Phillips?

A. No, I wouldn't say he did.

Q. Did you complete the job?

A. Yes, sir.

Q. The paper hanging?

A. I did everything—pardon me—I did everything but the fixtures that went into Mr. Humphries' restaurant. I didn't hang the pie case or a couple of other cases that were in there.

Q. But the paper hanging and the painting except for those fixtures of Humphries were all complete before you quit the job? A. Yes, sir.

Mr. Cottis: Your witness.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. McCutcheon:

Q. You played cards there, did you, Mr. Spradlin? A. Yes, sir.

Q. For money?

A. Well, yes, and drinks.

Q. And, as a matter of fact, one time you won \$40 there, didn't you? [714]

A. I wouldn't exactly say the amount, it was between—it was over \$40.

Q. On June 18th in my office in the presence of

(Testimony of William G. Spradlin.)

Mr. Humphries and Mr. Campbell did you at that time say you won \$40 at that time?

A. I said \$60, if you remember.

Q. Well, I will settle for \$60.

A. I wouldn't positively—I told you the second night I lost.

Q. And the chips were worth money at the bar, were they?

A. No, I didn't trade them in at the bar, I cashed them in at the game.

Q. I say, were the chips worth money at the bar?

A. For beer or drinks.

Q. And did those games go on frequently?

A. I only saw two or three games.

Q. You ate there regularly following the opening of the restaurant, didn't you, Mr. Spradlin?

A. Pardon?

Q. Didn't you eat at the restaurant regularly after it opened?

A. Not regularly but I was in every day or two and have coffee or pie or hamburger or something.

Q. And once in a while play cards?

A. There were only a few games going.

Q. Now, you have done a number of jobs for Mr. Starns since [715] the Panhandle job, haven't you?

A. Yes, sir.

Q. And what jobs have you done for him?

A. Fort Starns and the 1042 Club.

Q. Now, at the time you were in my office on June 18th had you seen Mr. Starns or Mr. Black-

(Testimony of William G. Spradlin.)

ard with reference to this case? A. No, sir.

Q. And I then subpoenaed you to appear here, didn't I? A. Yes, sir.

Q. And since that time you talked with him, have you not? A. Talked with everyone.

Q. And at my office in front of my office, we discussed the case and you advised me at that time, did you, that you could no longer be of assistance in this lawsuit, that now your testimony would hurt Mr. Humphries as well as help him, is that correct?

A. That is true, I can't see where it would hurt anyone.

Redirect Examination

By Mr. Cottis:

Q. Mr. Spradlin, have you ever advised Mr. McCutcheon that your testimony would help Mr. Humphries? A. No, sir.

Q. Did anything that Mr. Blackard or myself ever talk with you about change your testimony in any respect? A. No, sir. [716]

Q. How many times have you talked with me aside from right now in the Court room?

A. One.

Q. When was that?

A. Just before the lunch.

Q. Today? A. Yes, sir.

Q. And you have never talked with me before?

A. No, sir.

Mr. Cottis: No further questions.

(Testimony of William G. Spradlin.)

Recross-Examination

By Mr. McCutcheon:

Q. You talked with Mr. Blackard, did you not?

A. Sure, just like I do Mr. Humphries. I have known both of them ever since I have been in town.

Q. I know but you talked with Mr. Blackard after you talked to Mr. Humphries, didn't you?

A. Sure.

Q. And you also talked to Mr. Starns after you talked to Mr. Humphries, didn't you?

A. Spoke to him.

Juror: Mr. Spradlin, in answer to Mr. Cottis' question "Could Mr. Humphries have painted there if he had not been co-owner or hung paper?" you said "No," why couldn't he have?

The Witness: On Union status. [717]

Juror: Couldn't he have joined the Union?

The Witness: That I don't know.

Juror: Are you an active member is this local?

The Witness: I am for sure of the Master Painters and Journey Men, that according to the Union Business Agent he couldn't have done the job.

The Court: No, you made some statement about your own status of the Union.

Further Redirect Examination

By Mr. Cottis:

Q. You know of no one in the last fifteen

(Testimony of William G. Spradlin.)

months who joined this local who was not a journeyman painter?

A. I am not a judge of who is a journeyman and who isn't. We haven't any examining board.

The Court: Another witness may be called.

Mr. Cottis: Your Honor, may we have a fifteen minute recess at this time?

The Court: Counsel, of course, you may have but these recesses eat up our time and we get nowhere.

Mr. Cottis: I recognize that, your Honor, but, may it please the Court, there is a certain amount of uncertainty about getting witnesses here on schedule because it is difficult to know how long any one witness will be on the stand.

The Court: I suggest you bring them here and keep them for an hour or so. The Jurors are appearing here at great [718] sacrifice. It doesn't matter about the Judge or the Clerk or the Reporter because they are on the payroll anyhow. It is Jurors that are appearing here and I assume they don't like these continued recesses in order to accommodate some witnesses. Now, if parties are bringing lawsuits they ought to get their witnesses here and keep them here.

You may have your recess. Court will stand in recess until 8 minutes past 3.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. Cottis: Call Mr. Colip.

OLIN COLIP

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Please state your name?

A. My name is Olin Colip.

Q. And what is your occupation, Mr. Colip?

A. I am Chief Special Agent for the Alaska Railroad.

Q. How long have you been with the Alaska Railroad?

A. Five years the 24th of last May.

Q. Do you know Vern Humphries?

A. I met him, I think it was in the fall of 1946, coming [719] up on the train from Seward, if I remember right.

Q. Mr. Colip, are you familiar with the reputation Mr. Humphries has for truth and veracity?

A. I think I am.

Q. And will you tell me what that reputation is?

A. I would say it was very poor.

Mr. Cottis: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. That is his general reputation, is it, Mr. Colip?

A. That is right, with the railroad.

(Testimony of Olin Colip.)

Q. What is a person's reputation?

Mr. Cottis: I object, your Honor, the question is too vague.

The Court: Overruled.

The Witness: Well, if a man tells you he will do something and turns around and does something else, I question that as to his reputation.

Q. (By Mr. McCutcheon): That is what happened between you and Mr. Humphries, isn't it?

A. That is right.

Q. By that you determine that his reputation is poor as to truth and veracity, isn't that correct?

A. That is right. [720]

Q. You base that on what has happened between the two of you?

A. In connection with the railroad.

Q. Well, you understand the meaning of the word "reputation" don't you, Mr. Colip?

A. That is right.

Mr. McCutcheon: No further cross-examination.

Redirect Examination

By Mr. Cottis:

Q. Do you know of your own knowledge whether your opinion of Mr. Humphries is shared generally by railroad people?

Mr. McCutcheon: Objected to as an improper question.

The Court: Objection is sustained.

Q. (By Mr. Cottis): You testified that you are

(Testimony of Olin Colip.)

familiar with Mr. Humphries' reputation, did you not? A. Pardon?

Q. Did you not testify that you are familiar with Mr. Humphries' reputation for truth and veracity?

A. That is right, in dealings I had with him in connection with the railroad.

Q. Have you ever discussed his truthfulness with any other people? A. I have, yes, sir.

Q. With many or few? [721]

A. Quite a number of the railroad people—officials.

Q. And based on those discussions what is the general opinion of those people with regard to Mr. Humphries' truth and veracity? A. —

Mr. McCutcheon: Objected to as an improper question.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Is his reputation that you testified to a general reputation among railroad personnel?

Mr. McCutcheon: Objected to as leading.

The Court: Overruled.

Q. (By Mr. Cottis): You may answer that, Mr. Colip.

A. Yes, it is with railroad employees and officials generally.

Q. Did you not testify to Mr. McCutcheon that Humphries had broken his word with you personally?

(Testimony of Olin Colip.)

Mr. McCutcheon: Objected to as leading.

The Court: Overruled, you may answer—Did you or did you not so testify?

The Witness: That is right.

Q. (By Mr. Cottis): You did so testify?

A. With the dealings I had with Mr. Humphries in regard to [722] the way he carried on over at the mess hall.

Mr. McCutcheon: Move to strike the answer on the grounds it is not responsive.

The Court: Overruled.

Q. (By Mr. Cottis): What promises were broken by Mr. Humphries that you can recall?

Mr. McCutcheon: Objected to as leading.

The Court: Objection is sustained upon every other ground too, wholly improper.

Mr. Cottis: Your Honor, Mr. McCutcheon opened the door.

The Court: He did not open it to that extent.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: You may step down, sir. Another witness may be called.

Mr. Cottis: Call Mrs. Pickens.

THELMA M. PICKENS

called as a witness on behalf of the defendants,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. What is your first name, Mrs. Pickens?

A. Thelma M. Pickens.

Q. Where do you work, Mrs. Pickens? [723]

A. In the Personnel Office of C.A.A.

Q. Do you know Mr. Humphries and Mr. Blackard?

A. I know Mr. Blackard and I know Mr. Humphries by sight.

Q. Do you recall ever eating on the Panhandle premises when Mr. Humphries was operating the restaurant?

A. Well, right after Mr. Blackard took over the Panhandle my husband and I went in there on several occasions eating and we ate there all during the summer regularly nearly every day during the work week and then through the fall up until it burned.

Q. Did you eat there during the spring, too?

A. Yes, I imagine so because it was right after Joe took over the Panhandle there.

Q. Now, when you and your husband were eating there regularly, did you observe any card tables on the premises?

A. Well, I remember that there were tables back there, however, at that time we were eating mostly at the counter and as we became regular customers,

(Testimony of Thelma M. Pickens.)

well, it seemed like we more or less took over the tables back there, and so—I do remember that they had new tables there after a little while—new chrome tables when it was fixed over.

Q. While the card tables were on the premises did you ever see any card games being played?

A. No, I never did, because that was during the lunch hour, I know. [724]

Q. Did you ever see any evidence of friction between Blackard and Humphries?

A. No, I never did.

Q. Did you ever see any evidence of friction between Phillips and Humphries?

A. Never.

Q. Do you know Mr. Starns?

A. No, I don't.

Mr. Cottis: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. Were the chrome tables there when Mr. Humphries had the restaurant or was that after Mr. Guard took the restaurant over?

A. Mr. who?

Q. Mr. Guard—Jack Guard?

A. I tell you, at the time that we were eating there when we first started eating in there I didn't pay much attention to who had the cafe over there, but after awhile after we had been eating there so long you come to know the people and I remember Mr. and Mrs. Cavins—Dorothy and Carl.

(Testimony of Thelma M. Pickens.)

Q. Who?

A. I believe Cavins—Dorthy and Carl is what I knew them as, so I just can't recall when the tables went in or anything like that, who had it at the time.

Mr. McCutcheon: No further questions. [725]

Redirect Examination

By Mr. Cottis:

Q. Do you actually know that you were eating there while Humphries ran the restaurant?

A. I am sure I was. Well, the first time I remember ever eating in there was at the time, I believe, Mr. Humphries had cut his finger—hurt his finger—and that is how come me to just know Mr. Humphries then because we were sitting at the counter having lunch and I think my husband asked him how he hurt his finger and how he was doing. That is just an impression that was left on me at that time.

Q. And you ate regularly from that time on?

A. Yes, I would say that we did. I know that we, all through the summer and the fall that we were there.

Mr. Cottis: No further questions.

Mr. McCutcheon: No further questions.

The Court: Witness is excused.

Mr. Cottis: I will ask Vern Humphries to take the stand.

The Court: Mr. Humphries may resume the witness stand.

VERN HUMPHRIES

called as a witness on behalf of the defendants, having previously been sworn resumed the stand and testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Vern Humphries and you have already been [726] sworn in this matter, is that correct? A. Yes, I have.

Q. Now, Mr. Humphries, will you tell me as nearly as you can remember who your creditors were on April 1st, 1948?

A. Well, is there any particular one you want to know? I think I got credit from about everyone I went around and asked. I could borrow a dollar. I don't quite get what you mean.

Q. Mr. Humphries, you have no records available for that period of time, is that not correct?

A. Records for what?

Q. Of your liabilities and your assets?

A. Well, if you name any particular one I probably could take and tell you.

Q. Did you owe Anchorage Dairy any sum of money at that time? A. —

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: I have done—Anchorage Dairy, I don't know that name—Anchorage Dairy?

Q. (By Mr. Cottis): Did you owe Matanuska

(Testimony of Vern Humphries.)

Valley Cooperating Association any money at that time? A. At what time?

Q. April 1st, 1948?

A. Around April 1st I paid him but later I owed him a bill [727] of \$100 or some dollars, I don't know how much.

Q. Did you owe North Pole Bakery any money on April 1st?

Mr. McCutcheon: Objected to as incompetent, immaterial and irrelevant.

The Court: Overruled, you may answer.

The Witness: Yes, I believe I owed them something around that time.

Q. (By Mr. Cottis): Do you recall how much?

A. No, I don't.

Q. Do you still owe it to them?

A. North Pole Bakery?

Q. Yes.

A. I think there was a lawsuit when I wasn't present that they had taken a default judgment last summer. I haven't went into the matter though, I wouldn't say.

Q. You haven't looked into the matter of whether they took judgment against you?

A. I am sure there was judgment taken because I wasn't here. I was back east and I don't know when the trial came up.

Q. Did you owe a man named Moreland any money on April 1st, 1948? A. No.

Q. Do you owe Moreland any money today?

(Testimony of Vern Humphries.)

A. No.

Q. Does Moreland have a judgment against you for some money? [728]

A. Moreland is paid off.

Q. That is, the judgment was satisfied?

A. Yes.

Q. And about when did that occur?

A. I couldn't tell you the exact date on it.

Q. Was your indebtedness to Moreland incurred prior to April 1st, 1948?

Mr. McCutcheon: Objected to as immaterial.

The Court: I don't see the point of all this, counselor?

Mr. Cottis: Just this, your Honor, part of this lawsuit and part of the allegations of the complaint is that the defendants have injured Mr. Humphries' credit rating by their activities along in May, 1948. I am endeavoring to show that his credit was not very good prior to that date.

The Court: All right.

Mr. McCutcheon: If the Court please, I understand now that Mr. Cottis will be bound by the witness' answers?

The Court: No, no party is bound by the answer of any witness. The old rule that party is bound by the answer of a witness who is sworn at his instance no longer holds.

Mr. McCutcheon: Very well, sir.

The Court: You may answer, if you know. You may answer to the extent of your knowledge.

(Testimony of Vern Humphries.)

The Witness: I know up until April I paid my bills—current bills that was coming in—after that it was made so [729] impossible I had to buy more groceries and more meat for the operation. Yes, I owe some money here in town but until I can get some of my money out of the equipment that Joe Blackard deliberately stole away from me or taken away from me I haven't had a chance to take it back. Now, that is the whole truth and nothing but the truth.

Q. Now, did you owe Moreland some money before April 1st? A. I don't recall.

Q. Did Moreland sue you claiming that *he owed you* money?

A. I think the Court records will speak. I forgot what it is all about.

Q. Do you recall any suit by Moreland against you? A. The Court records will show it.

Q. Do you recall any such suit?

A. I still remind—the Court will show records of it.

Mr. Cottis: Your Honor, I ask that the witness answer the question.

Mr. McCutcheon: I think he has a good point.

The Court: Answer the question to the best of your knowledge.

The Witness: I think there is a court record out here that will show all the evidence in it but all the details of it I don't remember, that is by-goes in my mind.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Did you not go through two trials on the Moreland matter? [730]

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: Yes, it might have been two.

Q. (By Mr. Cottis): Now, do you recall whether your indebtedness to Moreland was incurred before April 1st, 1948?

A. You would have to look at the Court records for the date, I don't remember.

Q. Wasn't Moreland an employee of yours at the railroad and isn't that the indebtedness stemmed from?

A. I don't know what went on at the railroad at that time.

Q. Do you remember when you paid Moreland off?

A. I don't remember what just the coincident, the Court record will show it and I don't remember.

Q. Now do you recall whether before April 1st, 1948, you owed Herberts, Incorporated, a bill of \$162.16?

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: I don't know.

Q. (By Mr. Cottis): You don't remember just off-hand?

A. Just off-hand what is the name again?

Q. Herberts, Incorporated.

A. I can't recall it unless I could see the bill, I don't know what they do. [731]

(Testimony of Vern Humphries.)

Q. Do you know whether you owe a firm by that name any money today?

A. Right off-hand I don't recall the name.

Q. Now, did you owe Bliss Construction Company any money prior to April 1st, 1948?

A. Bliss Construction Company to this day has never asked me for a nickel.

Q. They have never sent you any bill?

A. No, sir.

Q. Did you ever have a discussion with Mr. Bliss and Mr. Schroeder about a bill?

A. I told them to take it to Mr. Blackard one time when they came down to see me and which I understood they did.

Q. You never acknowledged that you were indebted to them? A. No, I never did.

Q. Have you even been convicted of any felonies, Mr. Humphries?

Mr. McCutcheon: I object as improper, he called the witness, and at this time the question is highly improper.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Mr. Humphries, did you ever give Mr. Graves a check for the restaurant equipment?

A. Not a full check, no, there could have been a \$500 check, but I doubt it. I think I drew it out personally myself from [732] the bank.

Q. Did you not testify the other day that you never gave Mr. Graves any check?

(Testimony of Vern Humphries.)

A. I said to the best of my knowledge.

Q. Has your recollection changed now?

A. No, it hasn't, not unless I would see a check, and I did why I would admit to it but I don't recall. I believe I went to the bank direct myself and drew the money out.

Q. What was the total purchase price that you paid Mr. Graves?

A. I paid Mr. Graves \$2500.

Q. Now, can you recall any other creditors of yours who existed prior to April 1st, 1948?

A. Yes, I can recall about three suits which I haven't had a chance at two of them yet of paying that you sued me three times to date, yourself.

Q. I am referring to a time prior to April 1st, 1948?

A. There could have been a little current bills that weren't pushing at that time but at that time I paid all \$2500's worth of bills that were right then due and owing.

Q. And you can—and can you remember now whether Moreland had been paid off at that time?

A. I still maintain to look at the Court records and what happened to Moreland is right there in proof and that is the best that I can answer. Come to think of it, I believe Joe [733] Blackard agreed to take my icebox for the bill.

Q. What box was that?

A. That was the icebox in the Panhandle after I left here. Now it comes to my memory, out here

(Testimony of Vern Humphries.)

in the hall day before yesterday Moreland's attorney said he had reached agreement with Mr. Blackard at one time.

Q. Who is Moreland's attorney?

A. I believe it is Mr. McCarrey.

Q. Do you know what the agreement was?

A. No, I don't, it was barely spoken at a five-minute recess and I didn't take it in.

Q. Do you know whether that attachment—that cebox had been attached by Mr. McCarrey?

A. I told him at one time to attach it.

Q. Now, as of March 25, 1948, did you owe Pierce Manufacturing Company a bill?

A. Will you repeat that again, please?

Q. As of March 25th, 1948, did you owe Pierce Specialty Manufacturing Company a bill?

A. Yes, and I paid it, which I have a check to show.

Q. That is all paid in full now?

A. As far as my knowledge. My bill was paid by check which I have the check here to prove.

Q. You have the cancelled check here in Court?

A. I have the cancelled check. [734]

Q. Would it take you long to find the check, Mr. Humphries?

A. I don't know.

Q. Did you not owe prior to April 1st the Alaska Neon Engineering Company \$808.61?

A. Will you speak that again, please? I never owed a Neon Sign in this town in my life. That is Mr. Blackard's bill.

(Testimony of Vern Humphries.)

Mr. Cottis: Will you mark this for identification?

Q. Mr. Humphries, I hand you what has been marked Defendants' Exhibit G and ask you what it is, if you know?

A. No, that was the one you gave me the other day, I don't.

Q. And I show you that portion of Exhibit G which has the words "Vernon Humphries" written; I ask you whether that is your handwriting or not?

A. No, it is not.

Q. It is not your handwriting?

A. It is not my handwriting.

Q. Do you know Mr. Havins' handwriting?

A. No, just right off-hand I don't unless I seen him sign a paper.

Q. Did you ever see him sign this paper that you can recall?

A. No, sir, I never did see the papers that Mr. Havins signed with Mr. Blackard but I understood that he signed some kind of a paper I.O.U. \$450 or something of that sort and I was not present and that paper was never signed by me and how my name has got wrote on there—you must remember I am left-handed [735] and this is a right-handed paper.

Q. And you definitely will say you never signed that paper?

A. I will definitely say I never signed that paper.

(Testimony of Vern Humphries.)

The Court: How is that paper marked?

The Witness: It is Defendants' Exhibit F, your Honor.

Q. (By Mr. Cottis): Better still, Mr. Humphries, you said you had at least one of your cancelled checks in the Court room? A. Uh huh.

Q. Can you produce that?

A. Yes, I believe my attorney can, I can't. I can't because I don't have it.

Mr. Cottis: Your Honor, I request that it be submitted for handwriting.

The Court: If it is available counsel or the plaintiff may produce it.

Mr. McCutcheon: Well, what is counsel's purpose?

Mr. Cottis: For handwriting comparison.

Mr. McCutcheon: Well, there are forty signatures. For the purpose of making the comparison of the handwriting only, only, however.

Mr. Cottis: Yes. Do you have any objections to their being offered in evidence for that purpose only?

Mr. McCutcheon: May I see the checks again?

Mr. Cottis: Yes. [736]

Q. Mr. Humphries, while Mr. McCutcheon—Do you mind if I ask him some questions while you are looking at those?

Mr. McCutcheon: No.

Mr. Cottis: While Mr. McCutcheon is looking at those, will you list for me again the equipment

(Testimony of Vern Humphries.)

that you purchased in Seattle that was used in the Panhandle?

The Court: That has been gone over so often I don't see any purpose in having the witness repeat it.

Mr. Cottis: Very well, Your Honor.

Q. Mr. Humphries, you heard Mr. Campbell's testimony the other day, did you not, with respect to the repayment of that \$450 to Joe Blackard?

A. Yes.

Q. And was that testimony correct so far as your recollection goes? A. Yes, it was.

Q. Who was it who handed the \$450 to Mr. Blackard?

A. That was one of my employees.

Q. And what was his name?

A. Oh, I don't know whether I can recall his name right now or not without getting in some of the records, I had so many employees there that I forget just which one, but I believe that his first name was Dol or Del or some such name, I really can't recall right now. I know the kid when I see him. [737]

Q. Do you know where he is right now?

A. Not for sure, I seen him on the streets here a couple of weeks ago but I don't even know where he lives. I probably could run into him in the next three or four weeks, if you would wish for me to do so.

Q. Is this ex-employee of yours a relative of Mr. Campbell's, that you know of?

(Testimony of Vern Humphries.)

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: I don't know whether he is or not.

Q. (By Mr. Cottis): Does Marvin Campbell have a cousin named Del?

A. He has one named Delmer, but I don't believe it is Delmer. I don't believe he ever worked for me. I borrowed the money from Delmer but I am confident it wasn't Delmer because I have another kid in mind.

Q. Was it the entire \$450 paid to Blackard at that time? A. Yes, sir.

Q. And was it all in cash?

A. It was all in cash.

Q. Do you remember the denominations of the bills?

A. No, I don't take that time, I have never looked at any bill in my life and I have handled thousands of them.

Q. Where did you get the money—from your cash register? A. No, I didn't. [738]

Q. Where did you get it?

A. Joe came over somewhere around 11:30 and he says "Vern, I have just got to have some money because I am so short" and I say "O.K., I will get it for you." I have already spoken to Mr. Campbell and Mr. Ingram, so they both were around there. Mr. Campbell was there for his mother—the remodeling and so forth—and he was help-

(Testimony of Vern Humphries.)

ing both Joe and I and I had asked him to borrow \$300 from him and \$200 and some dollars from Del Ingram, and they both went to the bank. Del Ingram went to the First National Bank and drew money out that day and Marvin Campbell went to the Bank of Alaska and drew money out that day, and they both brought it to me. It wasn't over five minutes apart.

I think Delmer came back before Marvin did and when I had the money in my hands I give it to this person and says "Give it to Joe over there" and I hollered at Joe "Here is your money" and he says "Thanks" or something like that back at me, and that was the end of it.

Q. Delmer came in first with the money that he had borrowed? A. Yes.

Q. And then Marvin came in within five minutes or so?

A. They both came in practically the same time; it wasn't more than two or three minutes apart one way or the other.

Q. And you simply held Delmer's money until Marvin came in?

A. I didn't go back to the bank with it. [739]

Q. Did you put it in your cash register?

A. No.

Q. Did you put it in your pocket?

A. That could have been the only logical place I could have put it.

Q. Did you put it in your pocket intact?

(Testimony of Vern Humphries.)

A. Yes, I put it all in my pocket.

Q. And then when Marvin gave you the money he had borrowed did you put that in your pocket?

A. I counted out the rest of the amount right out on the counter. I counted out the \$300 to make it. It was \$300 correct, and I took the money from my pocket and finished up the amount and handed this to the person standing there beside me and said "Give this to Joe" and hollered at Joe.

Q. Where was Marvin Campbell?

A. Marvin Campbell was right in front of the counter.

Q. Were you in front of your counter or behind? A. I was right behind.

Q. Marvin and you both were behind the counter?

A. We was all inside of 31 feet behind the counter working.

Mr. McCutcheon: If the Court please, may I be heard on an objection to the present line of cross-examination. Counsel once had an opportunity to cross-examine this witness and did so on the very subject and went over the ground in detail.

The Court: Objection is sustained. [740]

Mr. Cottis: May it please the Court, no evidence that this method of payment came out until Mr. Campbell's testimony.

The Court: Objection is sustained.

Mr. Cottis: Very well, Your Honor. Does coun-

(Testimony of Vern Humphries.)

sel have any objection to introducing those checks in evidence for handwriting purposes only?

Mr. McCutcheon: Did counsel intend to introduce the document that is purported to be signed by Mr. Humphries?

Mr. Cottis: Yes, if I can authenticate it.

Mr. McCutcheon: Under those circumstances I suppose I shall be permitted to see it?

Mr. Cottis: Yes. Would you mark this for identification?

Mr. McCutcheon: May I inquire?

The Court: Yes.

Mr. McCutcheon: Whose handwriting appears at the top? Do you recognize Joe Blackard's handwriting when you see it?

The Witness: Yes, I do.

Mr. McCutcheon: Is that Joe Blackard's handwriting?

(No response.)

Mr. McCutcheon: Is it signed by Joe Blackard?

The Witness: Yes, yes, that is Joe Blackard's handwriting—no, I don't believe this here is the same as his name. It looks like Joe's handwriting. I don't believe so.

Mr. McCutcheon: Is it signed by Joe Blackard?

The Witness: It is signed Kenneth Havins, Joe Blackard, [741] Vern Humphries.

The Court: Court will stand in recess until 4:00 o'clock.

(Short recess.)

(Testimony of Vern Humphries.)

The Court: The record without objection will show all members of the Jury present. Counsel may proceed with the examination.

Mr. McCutcheon: I show you again Defendant's Exhibit F, Mr. Humphries——

The Court: That is not in evidence yet, Mr. McCutcheon.

Mr. McCutcheon: For identification, sir.

The Court: Very well.

Mr. McCutcheon: And ask you if you signed that piece of paper?

The Witness: I signed a similar one but not this one.

Mr. McCutcheon: That is not your signature?

The Witness: I signed the one I signed in pencil.

Mr. McCutcheon: Was it similar to this one?

The Witness: Yes, it were.

Mr. McCutcheon: Same provision in it as far as you know?

The Witness: As far as I know it is, but we didn't use a pen, we didn't have a pen that day and we all used a pencil.

The Court: What are we waiting for now, to determine whether certain checks will be produced?

Mr. Cottis: Yes, Your Honor.

Mr. McCutcheon: I have offered a number of checks with [742] Mr. Humphries' signature. Counsel can take it from there.

Mr. Cottis: You have no objection to the introduction of these particular checks?

Mr. McCutcheon: No.

(Testimony of Vern Humphries.)

Mr. Cottis: Do you have any objection to the introduction of this?

Mr. McCutcheon: Yes.

The Court: I understand the checks are offered only for comparison of handwriting, is that correct?

Mr. Cottis: Yes, Your Honor.

The Court: They may be admitted in evidence for that purpose and the Jury are instructed that they will not consider these checks for any other purpose than the handwriting on the checks. Is it admitted that the defendant—or that that the Plaintiff, Humphries, signed the checks, is that admitted?

Mr. McCutcheon: Yes, Your Honor, that is admitted. However, we object to the introduction of the document.

The Court: Let's get the checks over first. What will be the number?

The Clerk: Defendant's Exhibit I.

Mr. McCutcheon: I have no objection Your Honor, to the checks being admitted for general purpose and inspection by the Jury other than handwriting.

The Court: Does counsel wish to put them in for general purposes? [743]

Mr. Cottis: Yes, if Mr. McCutcheon will produce the remainder of them for general purposes.

Mr. McCutcheon: If counsel agree that they all can go in for general purposes I will offer them all.

Mr. Cottis: Certainly.

The Court: Add the rest of them to them. And I

(Testimony of Vern Humphries.)

take it that counsel will waive the reading of all these checks and that they may go to the Jury?

Mr. McCutcheon: Yes, indeed, sir.

Mr. Cottis: I should like to offer this in evidence, does counsel have objection?

Mr. McCutcheon: Well, I just thought perhaps I would give him all the checks here before I see it.

The Court: Haven't we enough checks, what is the purpose of putting in any more?

Mr. McCutcheon: I guess we have. Is counsel making this offer without any proof as to its authenticity?

Mr. Cottis: Yes, unless you object to it.

Mr. McCutcheon: Well, I would like to hear it authenticated; I will object unless it is.

Mr. Cottis: I will offer it in evidence anyhow on the basis of testimony this morning. It is notarized.

The Court: This is an assignment signed by Harold L. Bliss and acknowledged before a notary public and it may be admitted in connection with the testimony of Mr. Bliss. What [744] is that?

The Clerk: It is Defendants' H for identification earlier and it is Defendants' H now.

Mr. Cottis: May I read it to the Jury at this time?

Mr. McCutcheon: I will stipulate that it may go to the Jury without reading, counsel.

Mr. Cottis: I should like to read it.

(Testimony of Vern Humphries.)

“Assignment

“Know all men by these presents: That Harold L. Bliss, doing business as Bliss Construction Company, Anchorage, Alaska, does by these presents assign, set over and transfer unto Joe Blackard, of the same place that certain claim for Three Thousand Five Dollars and Eighty-Nine Cents (\$3,005.89) which the assignor hereof holds against one Vernon Humphries, also of Anchorage, Alaska, and which claim arises out of work performed and materials furnished at the instance and request of the said Vernon Humphries at premises known as The Panhandle Cafe, 314 Fourth Ave., Anchorage, Alaska, the said work having been commenced during February of 1948 and completed on or about 3 March, 1948.

“The consideration for this assignment shall be the execution of a Promissory Note in the sum of Three Thousand Five Dollars and Eighty-Nine Cents (\$3,005.89) payable by Blackard to the assignor, or his order.

“The assignor represents and covenants that the above [745] claim is equitable and just; that Humphries has no set-offs or counter-claims to apply against said claim; that the amount of said claim as herein set forth includes the sums due or heretofore paid to all sub-contractors, laborers and suppliers arising out of the work performed by the assignor.

(Testimony of Vern Humphries.)

“In witness whereof, the assignor has hereunto set his hand and seal this 4th day of May, 1948.

“/s/ HAROLD L. BLISS,

“dba Bliss Construction
Company

“Executed in the presence of:

“RALPH H. COTTIS,

“MARY KILROY.”

and the usual acknowledgement on it by the notary public.

Q. Mr. Humphries, in prior testimony you volunteered that Mr. Blackard had stolen some equipment from you, on what do you base that statement?

A. Well, he broke the locks off the doors that I had locked up and taken possession.

Q. Was this at the Panhandle?

A. It was at the Panhandle.

Q. And about what date, do you remember?

A. It was in the latter part of May.

Q. And what doors?

A. I closed up the 21st of May and he proceeded in there shortly afterwards. [746]

Q. Did you see him break the locks?

A. He admitted before the United States Marshal and myself that he did.

Q. And what locks were they?

A. They was locks to my reach-in icebox in the

(Testimony of Vern Humphries.)

back room and also the padlock on the door that led into that.

Q. And what equipment was inside your reach-in icebox?

A. There was no equipment inside the reach-in icebox.

Q. What contents did that reach-in icebox have prior to the time its locks was broken?

A. Will you speak that again? I didn't get more than one word.

Q. What were the contents of that reach-in icebox before the locks was broken, what was it?

A. It was meats inside of there.

Q. What equipment was in the room that was locked?

A. Oh, there was a meat slicer in there, there was a meat grinder, an electric saw, cube steak machine, french-fry cutter and various groceries.

Q. And the locks were broken sometime after the 21st of May, is that your testimony?

A. Yes.

Q. And before what date? When did you discover it?

A. Oh, it was about the latter part of the month, I believe. I believe it was somewhere around the 27th in there, I don't [747] know how many days before that it had been broken but I walked in there around about that time and I seen the locks broken and I went up and got the United States Marshal, Mr. Hoff, and brought him down there and Mr.

(Testimony of Vern Humphries.)

Hoff asked who taken the locks off and Joe said "I broke them out."

Q. Joe said himself?

A. Yes, yes, said himself, he had broken them off.

Q. What equipment, if any was missing?

A. I didn't inventory. I was only there just a few minutes.

Q. Had anything else of yours on the premises been broken into?

A. I was only there a few minutes and seen that those locks had been tampered with and the meat at that time then was on the truck out on the back backed up to the back door. And Mr. Hoff, the Marshal, and myself, ordered it to be taken back in. Later on Mr. Blackard had it condemned or something and we—and it was still hauled away in the same truck.

Q. What equipment did you ever find to be missing, if any?

A. I never taken no inventory after I left there, I don't know. It seemed to be pretty much burnt up when I came back and you couldn't very well tell then under snow and so forth what was in there and what wasn't. I know this stove was there and the counter and a few things like that under the rubbish, but as far as knowing what was in there I don't know from the day I put the padlocks on the doors, because the next [748] days I left for the States.

(Testimony of Vern Humphries.)

Q. Did you ever demand either personally or in writing that Blackard deliver that equipment anywhere?

A. I asked him to buy it or to let me sell it.

Q. When was that?

A. Oh, that was somewhere around the early part of May, I couldn't swear now just what the date was on it.

Q. Before the 21st of May? A. Yes.

Q. Now, when you closed the restaurant on the 21st of May, what kind of lock did you put on that storeroom?

A. It was just a common, ordinary lock.

Q. Was it a padlock or a bolt?

A. It was a padlock.

Q. Was it a lock that you, yourself, had purchased? A. Yes, I had.

Q. Were you back on the premises after that date?

Mr. McCutcheon: I would like to renew my objection, Your Honor, as to the line of questioning, at this time, that counsel once had opportunity to cross-examine on the same subject and did so.

The Court: Since that time the witness without any question having been asked has told about some property which he says was stolen from him by Joe Blackard. I think in view of that statement counsel has the right to examine as to the [749] property which the witness says was stolen. Objection is overruled.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Was it a padlock that you, yourself, had purchased somewhere, Mr. Humphries? A. Yes.

Q. After you closed the restaurant on the 21st of May, when did you next return to the premises?

A. I believe it was somewhere around the latter part of May. It was about the 27th, I believe, I could be off one day or two days but it was right in there.

Q. As nearly as you can recall then that was the first time that you had been back on the premises?

A. Yes, and then I was just into the back door and seen the meat and I went up then—the Marshal, and I left immediately and I came back down I guess some few hours afterwards and the padlocks was still off of the door. I walked into the store-room and the meat was thrown around there and I picked most of it up and put it back in the ice-box and I left right on out. I was only there a few minutes.

The Court: I think counsel should confine his questions to the matters brought up by the witness' answer. You have been all over this ground before concerning which the witness was just testifying, in fact, three times.

Mr. Cottis: I was not intending to get into the meat [750] situation, Your Honor. Do I understand that I am in the same position as continuing a cross-examination?

The Court: No, you called this witness, theo-

(Testimony of Vern Humphries.)

retically you could put on only testimony which was not brought out and could not rightly have been brought out by cross-examination. You are using the witness as your own witness.

Mr. Cottis: Yes, Your Honor.

The Court: And you should be governed accordingly.

Q. (By Mr. Cottis): Now, Mr. Humphries, what was the conversation between you and Blackard earlier in May when you state that you asked him for permission to sell the equipment?

A. Will you speak that again, I didn't quite get it?

Q. What was the conversation between you and Blackard earlier in May when you testified you asked him if you could sell that equipment?

A. I had a buyer for the place and Blackard didn't agree to it and I asked Mr. Blackard if he would reimburse me and he said he didn't see any grounds of doing so and that was the extent of it.

Q. You asked him if he would reimburse you for what?

Mr. McCutcheon: I renew the objections on the grounds previously stated, Your Honor.

The Court: Overruled. Answer the question.

The Witness: On the contract we signed upon Joe terminating me from the premises that he would take and purchase my stuff, so I asked him if he wanted to buy it?

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): This was after he had refused to consent to the sale?

A. Yes, it was practically all done.

Q. And was that the proposed sale to Mr. Garvin? A. Yes.

Q. Well, now, Mr. Humphries, you don't know then whether Joe ever misappropriated or stole that equipment or not, is that correct?

Mr. McCutcheon: Objected to on the grounds that he has answered the question.

The Court: Overruled.

The Witness: What I meant by the word "stolen" he had taken possession, went ahead and used it and used the groceries that I had on hand into the place and destroyed by the fire and somehow I don't have no equipment left. I don't know what you would call it but he used it for seven months thereafter.

Q. (By Mr. Cottis): Now, what leads you to believe that he used the inventory of supplies that you left there?

Mr. McCutcheon: Objected to as improper.

The Court: Overruled.

The Witness: Well, I have not been able to find any other [752] reason why because he taken the locks off of the doors. I did see him hauling stuff away from the place and when the place burnt down and according to the other people that was into it after Jack Guard was there, Mr. Guard said there was stuff of mine there—groceries——

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Never mind what other people told you.

A. Mrs. Cavins said—testified that there wasn't any. I don't know because I wasn't here.

Q. Who testified that there wasn't any?

A. Mrs. Cavin who operated the place after Mr. Guard.

Q. Is that the only basis for your belief that Joe stole something from you?

Mr. McCutcheon: Objected to on the grounds the question has been completely covered.

The Court: Overruled.

Mr. McCutcheon: If the Court please, despite the Court's ruling, I would like to renew my objection again. It seems to me that counsel has wide latitude and has two cracks at cross-examination of the witness and seems to be covering ground that to me he had an ample opportunity to cover in cross-examination before. It seems unfair. May I renew my objection?

The Court: Objection is overruled for the present.

The Witness: Well, he certainly taken over the equipment and used it. That is the only theory I have. [753]

Q. (By Mr. Cottis): Well, Mr. Humphries, did you make any demand on Joe after May 27th to return the equipment to you?

Mr. McCutcheon: Objected to on previous grounds, Your Honor, he had an opportunity to cover that point on cross-examination.

(Testimony of Vern Humphries.)

The Court: Objection is overruled. You may answer.

The Witness: Will you read the last question.

(Question read.)

The Witness: No, I never talked to Joe after that personally. I locked the place up depending on this trial here which I thought would come up with inside of two or three weeks, and I never dreamed at the time that it would take fifteen or sixteen months before I got a hearing on it. That was the theory I closed it.

Q. (By Mr. Cottis): And two fires in between, I suppose?

A. I wasn't here at the time of the fires so I couldn't say, Cottis.

Mr. Cottis: No further questions.

The Court: That is all, you may step down.

Mr. Cottis: Your Honor, Mr. McCutcheon is entitled to cross-examination if he wants to.

Mr. McCutcheon: No cross-examination.

The Court: An emergency matter is coming before the [754] Court at 4:30 and it is now 4:00. If you have a witness whose testimony can be quickly taken you may call him, otherwise we will suspend this trial and take up something else.

Mr. Cottis: Your Honor, I do, but it involves another situation and I will have to ask Your Honor's consent. It is one of the girls who works in our office, Mrs. Thompson, now she was in here

a few days ago in this Court room before I knew I would want her for a witness. I want her as a witness with respect to where she copied plaintiff's Exhibit 3 from.

The Court: I am afraid you will have to dispense with her testimony, counselor, because she, as you say, is one of your own people and she should have been warned. In Dr. Moon's case he is a professional man and ordinarily outside of the rules of professional people who testify to technical things, I, too, strictly held to the absence or exclusion of witnesses.

Mr. Cottis: Yes, Your Honor, in that event I have no short witnesses available.

The Court: Very well. Ladies and Gentlemen of the Jury, another matter comes up which the parties think that action should be taken immediately and it seems so to me—application for receivership. I feel that it ought to be heard promptly and this trial will therefore be continued until next Tuesday morning at 10 o'clock and, in the meanwhile, you will be careful not to discuss the case among yourselves or with others and not to listen to any conversations about it and not [755] to form or express an opinion until it is finally submitted to you.

Please report on next Tuesday morning at 10 o'clock. You may now retire.

(Whereupon, at 4:05, p.m., Wednesday, June 29, 1949, the trial was continued in recess until 10:00 a.m., Tuesday, July 5, 1949.) [756]

Tuesday, July 5, 1949.

The Court: Clerk may call the roll of the jury in this case.

(Names of Jurors were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Another witness may be called on behalf of the defendant.

Mr. Cottis: I will call Joe Blackard.

JOE BLACKARD

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct-Examination

By Mr. Cottis:

Q. You are Joe Blackard?

A. That is right.

Q. Is that your full name?

A. Joe DeWitt Blackard.

Q. And you are one of the defendants in this action?

A. That is right.

Q. Joe, when did you come to Alaska?

A. 1944.

Q. And what did you do after you got here?

A. Well, I worked for the Army for a year and one half to two years and then I came in and run the Firestone Service Center down here for a year or a year and one-half, and then I went [759] in business of my own at the Panhandle up until the

(Testimony of Joe Blackard.)

place burnt down, and then I had the Super Service Station out at 15th and East G.

Q. What was your arrangement about taking over the Panhandle business?

A. Well, I bought that along in January of 1948 and it was the Panhandle Bar and Cafe.

Q. What was the arrangement between you and Larry Starns, if any?

A. Larry loaned me \$10,000 and taken a chattel mortgage on any equipment or stock that I should have there and he was to take and put in a liquor store in one corner of the building and was to pay me \$175 a month for that liquor store for having it in there, which it did, and that was to go against my \$10,000 that he had borrowed from me.

The Court: I missed some of that, Mr. Blackard, I wonder if you can speak louder. You said something about \$10,000 and I didn't understand it: It is necessary for me to give instructions upon the law to the jury and therefore it is necessary that I hear the testimony. Will you repeat your answer once more.

The Witness: Mr. Starns loaned me \$10,000 when I went in there. It cost me close to \$23,000 to start with and I paid \$2,000 for the signing of the lease and \$20,000 for the lease and the equipment that was to go with it. [760]

Q. (By Mr. Cottis): Who did you buy the business from?

A. Mrs. Campbell—Bibbitt and Hardy.

(Testimony of Joe Blackard.)

Q. Were they operating it before you moved in there?

A. Yes, sir, Mr. Tibbitt and Mr. Hardy was operating it when I moved in there. We had a Clyde Graves who was running the restaurant at that time. Clyde Graves was running the restaurant and Mr. Tibbitt and Mr. Hardy had the bar and one time previous, a short while before, they had a cab stand in there which they also operated and they had a liquor store which they operated.

Q. Had you had experience in operating bars?

A. No, I hadn't.

Q. How did you happen to go into that business?

A. I thought I would try to go in business of my own myself there and Mr. Hardy traded with me down at the Service Center and he and Mr. Tibbitt were wanting to get out and Mr. Tibbitt was getting old and they started talking to me and I wound up behind the place.

Q. What was the purchase price?

A. Paid Mr. Tibbitt and Mr. Hardy \$20,000 plus about \$900 approximately for the liquor license—Territorial Liquor License; paid Mrs. Campbell \$2,000 for the signing of the lease then. They had a provision in the lease that they couldn't assign it without her consent. [761]

Q. Then all together you paid \$22,900, is that correct?

A. Approximately, yes.

Q. And did that include any stock?

A. No, there was no stock there—there was a

(Testimony of Joe Blackard.)

little bit left, left just a few bottles of stuff on the back bar and all the Cokes and soft drinks, they let that go with it.

Q. Just what did the \$22,900 include?

A. Well, there was a restaurant there we had a bill of sale for. Mr. Hardy gave us a bill of sale for the equipment that was in the restaurant and he also gave us bill of sale for some of the stuff that was on the bar. There was some that wasn't movable at the time the lease would be up and it was just for fixtures and good will.

Q. When that lease was assigned to you—The assignment, I believe, is in evidence. I notice that it was assigned by Tibbitt to you and to Larry Starns, why was that?

A. Well, in order for Larry to put a liquor store in there and by the provisions of the leasing, well, he couldn't put a liquor store in without getting hold of Mrs. Campbell and getting her o.k. and I needed some money and he said that he would loan me \$10,000 with two years to pay and \$4,000 the first year and \$6,000 the second year and we would let the \$175 that he was to pay against, on the liquor store, let that apply to the debt that I owed him and I could pay him out by the month until I had him paid off at 8 per cent interest. [762]

Q. Well, were you and Starns partners?

A. No.

Q. Did you have any interest in the liquor store?

A. None whatsoever.

(Testimony of Joe Blackard.)

Q. Was the liquor store connected in any way with the Panhandle premises physically? I mean were there any doors or anything like that?

A. No, there was a door led to the liquor store from the outside and one led into the Panhandle from the street.

Q. Did Starns have any interest in the Panhandle Bar or restaurant business?

A. No, only interest he would have had would have been in case I defaulted on my lease he had a note saying that I had to pay him \$4,000 by the first of the year, '48 and \$6,000 by the first of the year of '50.

Q. Was that the total of your obligations as to Starns?

A. That is right, I bought a little stock from him that we used and had to pay back, too.

Q. I am sorry, I couldn't hear that.

A. I had bought some beer and stuff on the original investment. He bought Mr. Hardy's and Mr. Tibbitt's stock from them and then he left some of it there and I used some, which was also charged against me.

Q. After you bought the Panhandle business from Tibbitt and Hardy who was operating the restaurant, if anyone? [763]

A. Clyde Graves.

Q. Where is he now?

A. He is in Seattle.

Q. What happened between you and Graves, why didn't he continue operating?

(Testimony of Joe Blackard.)

A. Well, he said that I wanted \$200 a month for the restaurant and wanted him to move it and he said that he couldn't see it.

Q. So then what happened with respect to the restaurant?

A. Well, I said I was going to remodel and I told him the day I wanted to start remodeling and he said he would be out by that day—what stuff he had he would have out—of his stock and he would replace some old stuff that was in there and he said that he would have his stuff and he would move out.

Q. And was he? A. That is right.

Q. Then what happened?

A. Well, Mr. Humphries came along about that time and said he was a restaurant man and he had been operating down at the railroad and he was a cook and he was interested in running a restaurant. At that time I told him that I didn't want to run a restaurant and I didn't know how to run a restaurant, I wasn't a cook, and I was looking for someone to run a restaurant for me.

Q. Where did Havins come into the picture?

A. Kenny? He had just been let off the Police Force and I don't know—I didn't know him at that time. Mr. Humphries brings him in and said that he wanted Havins as a partner, something like that.

Q. Was that agreeable to you? A. Yes.

Q. Then what happened?

(Testimony of Joe Blackard.)

A. Well, they came in and we started to remodeling and we were down for about a month—well, Mr. Humphries did. He went ahead. We had an agreement drawn up that he was to move the restaurant back, stand the expenses of moving it back, and Mr. Starns was to put the liquor store where the restaurant had originally come from and he was just to move the restaurant back about 18—approximately 18 to 20-foot back.

Q. Was there any agreement between Humphries and Starns that you were aware of?

A. None whatsoever.

Q. Was there any conversation or agreement between you and Humphries about the length of the counter?

A. Well, there was. We were talking about how far back we should move it and I don't remember how it came up, anyway it got in the agreement—said approximately 18-foot. It was to vary a little either way according to the agreement.

Q. What was the agreement, if any, about operating hours for the restaurant? [765]

A. Well, there was no agreement in particular, Mr. Humphries and I talked about it one time and I was kind of interested and maybe the restaurant would stay open 24 hours if it would pay because it would mean more to me, the more it stayed open and the more he taken in the bigger my percentage would be and we talked about leaving it open 24 hours and I said I would be for it and

(Testimony of Joe Blackard.)

he said he would like to leave it open, too, if it would pay his help.

Q. What was the arrangement, if any, about payment for moving the counter and remodeling the restaurant and equipment?

(No response.)

Q. Were you to pay for it or Humphries or who?

A. Mr. Humphries, that was the agreement that he would stand the expense of moving the restaurant back and then he could operate it for me there.

Q. And did he stand the expense of moving it back? A. No, not that I know of.

Q. What happened in that regard?

A. Well, Mr. Bliss came along and did most of the work, he and Anchorage Installation which was working under Mr. Bliss,—the plumbers were—and they do the work and then they didn't get paid and they came up shortly after we were open and Mr. Bliss told me he was intending to close me down if something wasn't did.

Q. So what was done? [766]

A. I came up to you and asked if he could close me down on someone else's bill and he said on someone's bills on a labor bill there he could; he could close the place down until someone paid it. And then in about ten days—in a few days I went down to see Mr. Bliss and I asked him to come up

(Testimony of Joe Blackard.)

to your office and we would talk it over and see what kind of agreement we could draw up and we drew up an agreement that I would pay the \$3,000 off and pay it at \$500 a month if I could, which I couldn't, but I paid \$250 a month, approximately.

Q. And that was Humphries' obligation, was it? A. That is right.

Q. Well, now did you have any other discussions with creditors of Humphries?

A. Well, yes, along about that time this Pierce Upholstery they put some leatherette on the front of the counter and Mr. Humphries was to pay for that. I think maybe he did pay a few dollars on that, I don't know how much it came to. I know Mr. Pierce filed a lien against the Panhandle Bar—Panhandle Cafe over in one of the law offices here that was left him owing sixty-five or seventy-five, and they talked to you about it and you called me and we had to pay that one off for Mr. Humphries and also Mr. Barrett came up—that was later on—he didn't come up, he sent Harry Andrews down from Grocery Supply and Harry told me they were going to close me down unless I paid the \$3,000. At that time they first came to see me it was [767] something like \$1700 or \$2,000 and I told him I wouldn't pay it. He said "Someone is going to have to pay for it" and I said "I wouldn't." I told him if he didn't get paid I wouldn't deliver any more, that I wasn't going to pay it. You said about on groceries and consumable supplies that you didn't think that I would have to pay it.

(Testimony of Joe Blackard.)

Q. Was the restaurant operating all during this time? A. Yes.

Q. How many hours per day, if you can remember?

A. Well, I don't exactly. I think that it operated 24 hours a day part of the time and I think there was a little while that it was operated just—I wouldn't be sure of that—I think maybe he closed at night for a few hours there for a while.

Q. What about the card playing? Was there card playing on the premises?

A. Yes, we had just a few days of card playing there in one month.

Q. When was that, do you recall?

A. I would say it was the last of March and the first of April, approximately.

Q. Did Humphries object to the card game?

A. None whatsoever, he played in the games quite considerable. I don't play cards, but I did see Mr. Humphries played in the games quite a bit. He wasn't cooking, he had lost his finger [768] and he was in there quite a bit in the afternoon and evenings and we had about the ten days we had card games there and Mr. Humphries played quite a bit.

Q. How many tables of card games?

A. There was two and there was two tables back there and we had one game going, which was the most they ever had because it was early in the spring and there was just no one playing, there was no money at that time.

(Testimony of Joe Blackard.)

Q. Did you just state that the most you ever had was one game going?

A. To the best of my knowledge it was. We had two tables but it was kind of close back there for them to get around and there wasn't many people in and one game was all we ever had.

Q. What kind of game, do you know?

A. I think they had knock poker, maybe.

Q. Did you receive some sort of profit from the card table operation?

A. I did not.

Q. Did you receive nothing at all?

A. No, there was—there was—there just wasn't any money made.

Q. What did Starns have to do, if anything, with the card games?

A. Nothing at all that I knew anything about.

Q. Now, Joe, I show you what has been marked for identification [769] as Defendant's Exhibit F and ask you what it is?

A. Well, that is a little note that was drawn up at the time we opened up. Mr. Humphries bought some of Mr. Graves' stuff. There had been new stools put in there and Mr. Graves had put those in. He had taken the old ones out and he hadn't thrown them away, they were downstairs, they weren't near, and he said "I will take my new stools out and put in the old ones." And there was a restaurant operating before he went in there and there was enough stuff to continue to operate the restaurant, but the stuff he had was a great im-

(Testimony of Joe Blackard.)

provement for the restaurant. So Mr. Humphries was to buy that stuff.

Started out Mr. Graves asked \$500 for that—\$2500, and he came down and I think that he finally sold his stuff for \$2250 and Mr. Humphries didn't have enough money to buy this stuff and he borrows \$450 from me, and this is the note he borrowed from me there in the Panhandle while the place was torn down.

Q. Did you see Mr. Humphries sign the note?

A. That is right.

Q. Which hand did he sign it with?

A. I wouldn't say, I don't remember which hand he signed. I think he can sign with either hand, so I wouldn't say which hand this was with.

Q. Who was present at the time he signed it?

A. Clyde Graves, Universal Food, was present and Kenny Havins [770] that was a partner he had at that time, and he was present, and I don't quite recollect this other. I think a fellow that worked for Graves at the time was on this other signature here as a witness.

Q. Was that \$450 ever repaid to you?

A. It was not.

Q. Was any part of it ever repaid to you?

A. None whatsoever.

Q. Did you ever receive a bill for paper hanging from Humphries? A. I did not.

Q. What were your arrangements about paper hanging in the Panhandle?

(Testimony of Joe Blackard.)

A. Mr. Spradlin did paper hanging for me, and all the painting for the inside of the building and the outside. He stained the back bar. We had the back bar remodeled and we put stain on it and varnish. And he did that and he had about, oh, approximately five men working for him. Mr. Humphries had asked to work for him, so Mr. Spradlin says that Mr. Humphries asked to work for him, I don't know, he was supposed to have worked a little bit.

Q. How much of the paper hanging and painting work was Mr. Spradlin supposed to do for you?

A. He was to do it all.

Q. What sort of payment arrangements did you have with Spradlin? [771]

A. Well, I was just to pay him. He was a contractor. He had about five—approximately five men—four or five—and himself that worked there and he also had a job out at the Fort going on at that time and he would switch men when he would get a slack spot out at the Fort he would bring them into town and work there in the Panhandle and he gave me a bill which I paid, and we have the bills that we paid—I think in the neighborhood of \$500—that we paid for the labor that was done inside there, Mr. Spradlin gave us the bill for.

Q. Did you ever authorize any one else to do the paper hanging in there?

A. Well, at nights there we did a little bit ourselves when we would close up the front door. We

(Testimony of Joe Blackard.)

didn't do paper hanging, we would close up the front door and it was all boarded in and we would work there a little at nights trying to help out a little bit.

Q. Who worked there at nights to help out a little bit?

A. Glen Phillips worked there with us a little, Harold Brand and myself, and I wouldn't say, Mr. Humphries says he did, I don't remember whether he did or not.

Q. Are you absolutely certain that \$450 was never paid? A. I am positive it wasn't.

Q. Did you hear Mr. Humphries testify that he paid it? A. That is right. [772]

Q. Did you hear Mr. Campbell testify that he saw somebody pay it to you?

A. That is right.

Q. But you are still certain that it was not paid? A. It was not paid.

Mr. Cottis: I offer this in evidence.

The Court: Is there objection?

Mr. McCutcheon: Yes, we object, your Honor, on the grounds that it hasn't been properly authenticated, that there is a dispute as to whether or not it was the original statement.

The Court: Objection is overruled and it may be admitted and may be read to the jury and marked Defendant's Exhibit F.

Mr. Cottis: It is on a printed form entitled at the head: "Statement." It is dated Anchorage, Alaska, February 5, 1948.

(Testimony of Joe Blackard.)

“I, Joe Blackard, loan the amount of Four hundred fifty dollars to Kenneth Havins & Vern Humphries, known as The Alaska Food Supply. This money is to be paid back the 2-15-48 or the equipment purchased from Clyde Graves, that is now in the place of business known as the Panhandle Cafe be turned over to me, Joe Blackard, without any lien or trouble of any kind on that date.”

and it is purportedly signed by Joe Blackard, Kenneth Havins, Vernon Humphries, and witnessed by C. L. Graves and some other signature which I can't read. [773]

Q. Joe, how did Kenneth Havins happen to leave the business, if you know?

A. Well, I don't think he and Mr. Humphries got along any too good, I don't know.

The Court: What was the answer?

Q. (By Mr. Cottis): Did you ever make any objection——

(Answer read.)

Q. (By Mr. Cottis): Did you ever object to Mr. Havins operating the restaurant?

A. None whatsoever.

Q. Now, who operated the restaurant after Havins?

A. Well, as far as I knew Mr. Humphries was to operate the restaurant.

Q. Did you ever consent to the partnership of a man by the—a man named Jones with Mr. Humphries? A. No.

(Testimony of Joe Blackard.)

Q. Was there ever a man named Jones that you know of in there operating the restaurant?

A. I think there is a fellow by the name of Jones worked a few days for Humphries.

Q. Do you know what arrangement existed between Humphries and Jones? A. No. [774]

Q. Did you ever consent to Mr. Campbell's going into partnership with Humphries on that restaurant operation?

A. I didn't know he was in partnership with him until they filed suit against me as partners.

Q. Did you know who Campbell was?

A. Yes, I knew him.

Q. Had he been around the premises?

A. Yes, when we were remodeling. One day I was intending to put a cab stand in the back end of the Panhandle and I was going to move it to the side of where the old stand had been at originally and had a carpenter there putting the cab stand in, was going to put a small counter in low to take in calls on cabs, and Mr. Campbell goes up and sees his lawyer. He was in the place, walks out of the place and goes up to see Mr. McCarrey and sends Mr. McCarrey down that time—was he and his mother's wish that I wouldn't put a cab stand back in there because they didn't think it was a legitimate business; they didn't want me to have because maybe I would be subleasing. Mr. McCarrey came down and said that they wished that I wouldn't. They had a fellow by the name of C. W. Major,

(Testimony of Joe Blackard.)

and he stored the partitions and we left it vacant when we put in an air line office at the same place.

Q. Did you ever observe Mr. Campbell working for Mr. Humphries or working with Mr. Humphries?

A. Not until after we opened up, then I think Mr. Campbell [775] the first few days after the Panhandle was open after remodeling Mr. Campbell went to washing dishes; they had bought a dishwasher and it had hardly served the purpose, it was too small, but, anyway, they had Mr. Campbell as a dish washer.

Q. How was the restaurant operation?

A. Well, it wasn't any too awfully good, as I would see it, it had run down pretty fast.

Q. In what way?

A. Well, sanitary way and just several different ways—the help wasn't paid and they were late being paid and they didn't get along too well, they had an awful turnover of help and the Union was in there about half the time with their help and it was just kinda a mess.

Q. Did you ever tell Humphries that he did not have to furnish the \$3,000 bond indemnifying you against liability to his creditors?

A. I did not.

Q. Did you ever hear any conversation between Humphries and anybody regarding that bond?

A. No, I didn't.

Q. Did he ever furnish the bond?

(Testimony of Joe Blackard.)

A. I never did see one.

Q. Did he ever pay you the \$200 per month or the 6 per cent of gross? A. No, sir. [776]

Q. Now, what were the arrangements between you and Mr. Humphries as to payment for electricity and fuel and that sort of thing?

A. Well, I was to heat the building, furnish the overhead lights that was sufficient for the building, and Mr. Humphries that he needed a small light in front of each customer and he wasn't hardly satisfied with the lights or he wanted to put an extra icebox in. He was to take care of his own lights. There was a meter put up for the restaurant and there was also six or eight hundred-gallon oil tank out back to take care of the oil range that the restaurant used and it was separate and the meters were separate from the one on the main part of the building and the oil tank was separate.

Q. Well, all the contractors—both versions, as shown in Plaintiff's Exhibits 1, 2 and 3 provide that: "That Blackard is to furnish the light, heat and water * * *." What about water; did you furnish that?

A. No, I don't think that I did. I have an idea that Mr. Humphries' water was billed to him right along with his electricity bill, I wouldn't say, I don't know. The only thing, I did have the 'phone and I know they billed that to me and I think they billed him for the water. They billed me for my water.

(Testimony of Joe Blackard.)

Q. Do you know whether they billed him for water or not? A. No. [777]

Q. Did Mr. Humphries ask you to reimburse you for water? A. No.

Q. How many meters were there on the premises? A. Three.

Q. What were they for?

A. One was for Larry Starns' liquor store and the other was for my bar and I had two or three ice-ing machines. I had one ice-maker and had two cold boxes—cool boxes—one was—both had electric motors and the other was for the restaurant that ran two or three iceboxes. The stove ran off electricity—the motor on the stove. Mr. Humphries had added three or four lights over the tops of his counter low, I would say four or five foot over the top of his counter, and if I am not mistaken City Electric or Anchorage Electric put those in for him.

Q. What, if any, was Glen Phillips' position at the time?

A. Well, when we first opened up Glen worked as a bartender for a couple of weeks, maybe a month and he came in as a partner in the Pan-handle.

Q. Do you remember when that was?

A. No, I don't.

Q. I show you Plaintiff's Exhibit 14, is that a good reproduction of the restaurant?

A. That is pretty good.

The Court: Will counsel hold it so that the jury can see it? [778]

(Testimony of Joe Blackard.)

Mr. Cottis: I am not going into much detail, Your Honor.

The Court: Let the witness hold it up so the jury can see and they will be better informed.

Q. (By Mr. Cottis): What is this wall back here?

A. That is the back of the liquor store, back wall.

Q. And who are these people here?

A. The first three are Mr. Humphries' little kids.

Q. How did they happen to be in there, if you know?

A. We had kind of planned this picture ever since we opened up and they had come down to get their picture taken in the place. And that is Mrs. Humphries in the back there.

Q. When were the pictures taken, do you recall?

A. No, I don't, shortly after we opened up.

Q. Were arrangements made in advance for them?

A. Well, I don't know, I think Mr. Campbell made the arrangements to take the pictures to send to his mother. At that time he thought the place looked awfully nice and thought his mother would like to see a picture of the place and I think he made it. We all knew at the Panhandle—we all knew that they were going to have the pictures taken there a couple days.

Q. How long had it been——

(Testimony of Joe Blackard.)

A. I would say a day or two days ahead of time.

Q. You stated, did you not, that the restaurant was not being operated to your satisfaction?

A. That is right. [779]

Q. What, if anything, did you do about it?

A. Well, after about three months with no rent or two months with no rent or anything at all, I talked to you about it and we give a notice then that they would have to vacate the place on several reasons—Mr. Moon didn't like the way it was operated, and the debts were piling up pretty fast, fellows were coming in telling me they were going to close me down if I didn't do something about it, and about that time I had to make Mr. Bliss' \$3,000 bill good, had to sign for it anyway, and Mr. Barrett was bothering me, Mr. Pierce was after me and at that time there was several others that were coming in wanting to know about it and I hadn't had any satisfaction from the restaurant at all and we give the man notice to move from the place.

Q. Did he move from the place?

A. No, sir, he went ahead and operated on three or four more weeks.

Q. Did you do anything to interfere with his operation?

A. Well, not until after that we had given the notice for the man to move.

(Testimony of Joe Blackard.)

Q. Now, in the complaint it states that on May 5th you locked the storeroom, did you?

A. I don't know about the date exactly but we did lock the storeroom, not particularly his storeroom but the storeroom to where we had a few cases of beer and some liquor there. We [780] locked that storeroom. And I didn't go into Mr. Humphries' backroom there where the icebox was at in the back room and he could still get into the basement, which he continued to do to get into the basement.

Q. Who continued to get into the basement?

A. I don't know who did, they had a few supplies down there that they went ahead and used. They had some potatoes and some stuff and when the cooks would come to us and ask us when Glen and I either one were on the place we would open the door and let them down the store—went through the storeroom with them because there was a little stuff that we had missed there in the storeroom, too, so we would go right in there with them and wait until they came out and lock the door back up again, although not all the time, I would say. I don't remember of anyone ever asking the key that we didn't have it, but I know there was a few times we wouldn't have the key. I went through what is known as the coal chute. It is a drop in the floor there. You step down three feet and you take another three-foot stepdown. They inventoried the place when there was no key on the place and that was after the restaurant closed and that was

(Testimony of Joe Blackard.)

the way we got into the storeroom—Mr. Guard and the fellow from Alaskan Merchandisers went in that way because the key wasn't there.

Q. How long was that after the restaurant had closed, do you recall? [781]

A. The best I remember the restaurant closed on Thursday night or Thursday afternoon and I don't know the date and then on Saturday we got an inventory taken on the place and Mr. Castlio he looks it over and there was a little fish and a little stuff in there. It wasn't hardly what he thought. He said he couldn't inventory because as far as he was concerned it was no good, and I was going to throw it out and the Marshal comes up and he tells me I can't throw it out and we call Mr. Moon up and he comes in and looks at it and he throws it out himself and taken it away—the meat and the other stuff that was left in there—with the exception of the flour and the sugar and the other things that Mr. Moon had taken with him.

Q. Do you recall what the total value of the inventory made by Alaskan Merchandisers was?

A. No, I didn't—I saw the inventory but at that time Alaskan Merchandisers they had only inventoried the stuff that they owned themselves there—stuff that they had sold—and there wasn't an awful lot of their stuff there. And Jack, the best I remember his name, he says that most of the stuff belonged to Grocery Supply or Food Center and that he would have to have them price it out

(Testimony of Joe Blackard.)

because their prices would vary a little bit on each thing, and he priced his and the best of my knowledge he gave Grocery Supply the bill to price out. And he said at that time that it was approximately four to five hundred dollars. [782]

Q. Where is the inventory now, do you know?

A. I think Grocery Supply has it.

Q. Have you tried to locate it?

A. I have, Jack said that he couldn't, that he had gave it to Grocery Supply and that he had talked to Harry Andrews from Grocery Supply.

Mr. McCutcheon: Objected to as hearsay.

Q. (By Mr. Cottis): Yes, just stick to things within your own knowledge, Joe.

A. I had talked to Harry and he said that he——

Mr. McCutcheon: Objected to as hearsay.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Now, Joe, what arrangements did you make with Dorothy Cavins regarding the restaurant?

A. Well, before Dorothy came in we had had another person running the restaurant and when Dorothy came in we told her that we hadn't made any money from Jack Guard, that he hadn't cost us anything though and he hadn't paid us just any rent at all or anything for the use of the restaurant in there and he had paid his own lights and everything but he couldn't make any money, the place was run down and there was very few peo-

(Testimony of Joe Blackard.)

ple came in to eat at the restaurant, so Jack didn't make any money. Mrs. Cavins was running the Black & White at that time, or what is known as Wilson's now. She was a manager—she was a [783] manager for Wilson. She had quite a few people who liked her. She was a good worker and she wanted a restaurant of her own and she came and talked to me about the restaurant and I told her that we would talk to Jack and if he wasn't too undesirable about getting out of the place, that didn't disagree too much that we would let her come in, and Jack said his trade wouldn't mind him getting out, that he hadn't made any money and he said he couldn't make any money, in fact, it cost him to begin to operate and he was going to make some changes but he would just as soon turn it back, so he gets out and Mrs. Cavins comes in and she says that she would pay 10 per cent. She and her husband was going to work it. And she said if they had to work both shifts themselves that they would and they would make some money one way or the other, and that is the way they came in. They worked real hard and they brought a lot of their trade over from Mr. Wilson's Cafe and a lot of people who knew the two of them and had come over and they paid us 10 per cent. We paid everything and they just came in and cooked there, and if they taken in a dollar we got a dime of it.

Q. What do you mean when you said that you paid everything?

(Testimony of Joe Blackard.)

A. Well, at 10 per cent that way, well, she—we paid the lights, we paid the water, and all that she did was cook.

Q. Who paid the fuel oil? A. We did.

Q. Who paid the electricity for refrigeration and dishwashers [784] and that sort of thing?

A. I did, I did.

Q. And what was that percentage that you were getting? A. 10 per cent.

Q. What had the percentage been with Humphries? A. 6 per cent.

Q. Did Humphries ever make available to you his books showing what his gross receipts had been?

A. None whatsoever.

Q. What had been the arrangements with Graves concerning payment for fuel, heat, water and that sort of thing? A. He had always paid it.

Q. What percentage did Graves pay?

A. He paid \$150 a month, just a flat rent.

Q. Who, if you know, supervised the Bliss Construction work for Humphries, did you or Starns or Phillips or Humphries?

A. Well, no, Mr. Humphries did it himself. He had the carpenters to work for him and one night he kept the plumbers working for him, which was cost me a lot of money in the long run, about \$40 an hour for an all-night session.

Q. How do you mean it cost you a lot of money in the long run?

A. I had to pay Mr. Bliss back for that work Mr. Humphries had done and didn't pay.

(Testimony of Joe Blackard.)

Q. Did you have anything to say about the construction of [785] the restaurant counter?

A. Well, the only thing we had to say was I told him where he could move it approximately and that was where it was to sit.

Q. What about the design of the counter?

A. I didn't have anything to say at all about any of that. Mr. Bliss turned the carpenter over to him or the foreman did and let Mr. Humphries tell the carpenter whatever he wanted did and that was what the carpenter was to do. I also had a couple of carpenters that was turned over to me to do the work that I wanted to do.

Q. When did the restaurant open, if you remember?

A. I don't exactly remember, don't remember the date. We opened along the first of February—fourth—or fourth or sixth or eight, something like that, anyway the bar opened on Saturday. The restaurant had a lot of trouble, he didn't get open officially and doing business to amount to anything until the following Monday or Tuesday.

Q. When did Larry Starns' liquor store open, if you know?

A. Well, Larry had his own carpenters and they finished up a little bit ahead of us and he had his store stocked and everything and he opened on Saturday morning that I opened at noon on Saturday morning.

Q. When was it that Humphries opened the restaurant?

(Testimony of Joe Blackard.)

A. He was three or four days later before he got where he [786] could prepare a meal in the restaurant.

Q. Did Humphries pay you any money at all when he opened? A. None whatsoever.

Q. Did he lend—did any money exchange hands between Humphries or Humphries' employees or friends? A. It didn't.

Q. Did you tell Humphries that you needed money at that time to get open? A. I didn't.

Q. Did Humphries ever ask that you pay a water bill? A. No.

Q. Did you ever prevent fuel oil from being delivered to Humphries or Campbell?

A. No, sir.

Q. Do you recall when it was that you had this notice served on Humphries?

A. No, I don't.

Q. Do you recall how long it was after the service of that notice that Humphries and Campbell finally left the restaurant premises?

A. Oh, close on to a month.

The Court: Court will stand in recess until five minutes past eleven.

(Short recess.)

The Court: Without objection the record will show all [787] members of the jury present.

Mr. Cottis: Your Honor will recall that when Harold Bliss was testifying he was directed to have

his bookkeeper produce some original copies of documents today and she is here and I wonder if there would be any objection to placing her on the stand before taking further Mr. Blackard's testimony.

The Court: She may take the witness stand.

FRANCES CLAY

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Frances Clay?

A. It is.

Q. And you have charge of the records of Bliss Construction Company, do you? A. I do.

Q. Have you with you the company's copies of the bills regarding Bliss' work at the Panhandle premises? A. Yes, I do.

Q. Are they all the copies of what appear in your records? A. Yes.

Q. May I see them? A. Yes. [788]

Q. What is the significance of the three groups?

A. These were divided into three separate accounts—one for the cafe, one for the front, and one for the bar.

Mr. Cottis: May I have these marked for identification? Unless counsel has objection I would like to have them marked as a group, three groups altogether.

The Clerk: Defendants' J, K and L.

(Testimony of Frances Clay.)

The Court: What is the general name of these papers, Miss Clay, are they bills or invoices?

A. These are the original invoices.

The Court: Invoices.

Q. (By Mr. Cottis): Mrs. Clay, I show you the group of items which have been marked Defendants' J and ask you what these are?

A. These are the invoices for work done in the Panhandle Cafe.

Mr. Cottis: I offer these in evidence.

Mr. McCutcheon: Were you the bookkeeper in March, April and May, 1948?

The Witness: Yes, I was.

The Court: What was your answer that you were the bookkeeper at that time?

The Witness: Yes.

The Court: Did you make out the invoices embraced in Defendants' J for identification. [789]

The Witness: I perhaps ought to correct that, I—well, I wasn't exactly the bookkeeper, I was bookkeeper helper in training. There were two bookkeepers at that time but the writing is mine.

The Court: The writing is yours?

The Witness: Yes.

Q. (By Mr. Cottis): Mary Moore was the other lady there, is that correct? A. Yes.

Q. And she is no longer in the Territory, is that right? A. No, that is right.

Mr. McCutcheon: Did you intend to offer them all?

(Testimony of Frances Clay.)

Mr. Cottis: Yes.

The Court: Is there objection?

Mr. Cottis: I am only offering that one now.

Mr. McCutcheon: No objection.

The Court: Without objection the exhibit consisting of several sheets may be admitted as Defendants' Exhibit J, and they may be read to the jury.

Mr. McCutcheon: I will stipulate that the reading may be waived and read later.

Mr. Cottis: Very well, we so stipulate, your Honor.

The Court: Very well, it is understood then that the reading of this particular exhibit at this time is waived. [790] Either of counsel may read portions later or during arguments if they so desire.

Q. (By Mr. Cottis): Now, Mrs. Clay, I hand you what has been marked Defendants' K for identification and ask you to describe what that is?

A. These are invoices for the Panhandle Bar.

Q. And they are the original documents from your files, are they?

A. Yes, they are.

Mr. McCutcheon: No objection.

The Court: Without objection the papers marked for identification as Defendants' Exhibit K may be admitted and may be read to the jury.

Mr. McCutcheon: I will stipulate that the reading be waived.

Mr. Cottis: So stipulate.

The Court: By stipulation of counsel reading at this time is waived. Portions or all of the documents may be read later.

(Testimony of Frances Clay.)

Q. (By Mr. Cottis): Mrs. Clay, I hand you now what has been marked Defendants' Exhibit L for identification and ask you what that is?

A. These are the original invoices for the Pan-handle front.

Q. That is, the exterior of the premises in front?

A. That is correct.

Mr. McCutcheon: No objection.

The Court: Without objection the papers marked for identification as Defendants' Exhibit L may be admitted and may be read to the jury. On stipulation of counsel they may be read later.

Mr. McCutcheon: I will stipulate.

Q. (By Mr. Cottis): Mrs. Clay, I invite your attention to the last two items of Defendants' Exhibit L which bear printed numbers 6302 and 6374 and dates March 23, 1948, and March 8, 1948, and particularly I invite your attention to the words "Blackwell and Starns" on the first of those and "Blackard and Starns" on the second of those, can you explain to the Court, if you know, the reason for that change in the billing at that time?

A. We did not know at the first of this work that Mr. Blackard wanted his bills separated this way so that he would know how he would pay for them or put them in his books.

Q. Did you ever have any conversation with Starns about the matter, that you recall?

A. No, I did not.

(Testimony of Frances Clay.)

Q. Then is it your testimony that Blackard requests that the bills be made out that way?

A. Yes.

Mr. Cottis: Your witness. [792]

Mr. McCutcheon: No cross-examination.

The Court: That is all unless the jurors wish to inquire.

(No response.)

JOE BLACKARD

previously called as a witness in behalf of the defendants, having previously been sworn, testified as follows:

Further Direct Examination

By Mr. Cottis:

Q. Mr. Blackard, what is your explanation, if any, for the fact that on two of several invoices in Defendants' Exhibit L the words "Blackard and Starns" appear?

A. Well, on the front that we remodeled—the front of the building—we tore the old pair—there was no door on Larry's liquor, there was two doors on my side, one went into the old cab stand which was used as the office at that time and one went into the remaining part of the building. So Larry had to put in another door on his side and the whole thing needed working over—the whole front. It looked bad and we decided that Larry would put in for his side—he would pay for his side, and I would

(Testimony of Joe Blackard.)

go 50-50 on building the new front. There was very little talk did about it. We knew it needed a new door and a new front and Larry said "We will just put in a new one."

Q. What were your instructions, if any, to Bliss Construction about the matter?

A. I told—I went over to Mr. Bliss' office when I got my [793] bills and told them that I would pay the bill, which I did—pay for the front and my bar—and that for them to mark which was the front and which was the bar because the bar was all mine. The front half of the front was to be remodeled with Larry so that he could have a fairly nice looking front for his liquor store.

Mr. Cottis: Your witness.

The Court: Counsel for Plaintiffs may examine.

Cross-Examination

By Mr. McCutcheon:

Q. Was there gambling on the premises during the time the restaurant was there, Mr. Blackard?

A. We had a car—running card tables.

Q. Was there gambling at those card tables?

A. I think there possibly was, yes.

Q. Well, do you know or don't you?

A. Well, they played cards and as far as gambling I couldn't say what they were doing. They said they were playing knock poker and pan.

Q. Were they playing for money?

A. I imagine they were.

(Testimony of Joe Blackard.)

Q. Do you know?

A. Off-handed I wouldn't because I didn't play in them.

Q. Did you receive any profits from the game?

A. I did not. [794]

Q. You say you don't know how to play cards?

A. That is right.

Q. Did you ever at any time see cards played there for money?

A. ———

Mr. Cottis: Your Honor, the witness has answered that question three times.

The Court: Overruled.

The Witness: Now, just how did you mean that? I told you that I don't play cards. I didn't play in the games because I can't and I didn't receive any profit from them and I have an idea that they did play for money. I heard Mr. Spradlin say that he won some and lost some. I also heard Mr. Humphries say that Mr. Humphries was sitting in the game there with him, so I would say that they did play for money.

Q. (By Mr. McCutcheon): You would say that they did? A. Yes.

Q. Do you base that statement on the testimony of Mr. Spradlin, is that correct?

A. Not particularly, the whole thing so far as me knowing they played for money, I don't but that is usually the procedure for tables, though.

Q. The chips were good at the bar for a drink, weren't they?

(Testimony of Joe Blackard.)

A. That is right, and they would come back and pick them up after the game. [795]

Q. Who would?

A. The boys from the tables, first there would be one fellow and then another. I never taken any. I wasn't tending bar but I knew they did get them because once in a while when I checked the tills out there would be chips laying on the tills. They weren't rung up at all until——

Q. Who got the chip back?

A. The boys at the card tables.

Q. Who were the boys at the card tables?

A. Various fellows who came in and wanted to play cards.

Q. You mean that one of the players would get up from the tables and take one of his chips over to your bar and you would serve him a drink of whiskey?

A. I wouldn't say he was a player.

Q. Who, if he wasn't the player?

A. The fellow who brought the chip to the bar.

Q. What connection did that fellow have with the house?

A. I wouldn't say he had anything to do. There would be a dealer there and there would be boys sitting there at the table.

Q. What was the relationship between you and the dealer?

A. He was to operate the games and pay me anything if he made any money he was to pay me money.

(Testimony of Joe Blackard.)

Q. Did you ever make any money?

A. That of know of, no. If they did I didn't get any. [796]

Q. How many days? A. 10 days.

Q. Did you inquire every day? A. I did.

Q. What kind of maneuver went on that there was no money made? A. The dealer had shills.

Q. What is a shill?

A. That is another fellow who sits in the game to help make it look like a going game there.

Q. And are you sure you don't know how to play cards? A. That is right.

Q. All right, go ahead. A. You go ahead.

Q. How many shills sit in the game?

A. I would say three, something like that.

Q. Now on May 10, 1948, in the Commissioner's Court in this court house, in the presence of the United States Commissioner, Rose Walsh, twelve jurors and other persons being present, did you not swear to God that no gambling was ever conducted in that premises?

A. I said I never received any money for gambling in that.

Q. Did you not swear to God that you did not permit any gambling on the premises?

A. I would not say I did. [797]

Q. Is that your signature at the bottom of that affidavit? A. That is right.

Q. Will you check that affidavit over and see if you want to change your answer?

(Testimony of Joe Blackard.)

A. No, I won't change it.

Q. Did you not on the 17th day of May, 1948, before Ralph Cottis, a notary public, swear as follows: "No gambling is permitted by me on the premises"?

A. But as far as I know that is right.

Q. Well, you didn't permit any gambling on the premises, is that your testimony?

A. Oh, had a card room there.

Q. Who ran the card game for you?

A. There was a fellow by the name of Preston.

Q. Fellow by the name of what?

A. Preston.

Q. What kind of deal did you have with him?

A. Recreation card room and at the time that we started there if there would have been any money made I would have received some of it.

Q. How was the money supposed to be made?

A. From playing cards.

Q. For what?

(No response.)

Q. For fun or for money? [798]

A. Well, it would be played for money.

Q. Wouldn't that be gambling?

A. I think it would be.

Q. Well, did you think that it wasn't gambling when you made that affidavit?

A. I wouldn't say.

Q. Now, when you sold the chips back after liquor was bought at your bar, who bought the chips back?

(Testimony of Joe Blackard.)

A. I don't know, I never sold any back. I know they came to the bar and got the chips and gave them to the bartender.

Q. Well, who got the chips back?

A. The boys at the tables.

Q. The dealer?

A. Who ever came to pick them up.

Q. Well, did you ever inquire as to how come they were buying whiskey at your bar without putting money on the bar?

A. There was very seldom that that was done but as far as inquiring I don't know. They would bring the chips there and they would come and pick them up later and pay money for it and they did that.

Q. Who gave the bartender permission to give drinks for chips?

A. I don't know if any permission was given. They will come in any say "I will pay you later."

Q. Did you wonder at that time if the chips were worth money? [799]

A. They would come around in an hour or five minutes later and pick them up, you would just think they were.

Q. You knew at that time the chips were worth money, did you not? A. I think so.

Q. Well, how much would one chip buy?

A. I don't know—I don't know, just don't know anything about the chips.

Q. Did they have different colored chips?

(Testimony of Joe Blackard.)

A. I think they do.

Q. What color chips do they have?

A. I wouldn't know. I don't know.

Q. Did they have white chips?

A. I think they did.

Q. Blue ones?

A. I wouldn't say, I imagine they did.

Q. Red ones? A. I don't know.

Q. You just remember that they had chips?

A. And they were colored chips—they was colored chips there.

Q. Were all the chips worth the same thing?

A. I don't know, I don't know anything about the chips.

Q. How many tables did you have?

A. There was two. [800]

Q. And how many days were card games played?

A. I wouldn't say, just a short while—ten days or two weeks, something like that.

Q. And during that two weeks' period who played in the games?

A. I really don't know, some of the customers that came in. Oh, that brings in a few people.

Q. During that period of time did you ever ask your dealer if he made any money for you?

A. Oh, yes.

Q. What did he say?

A. Didn't make any money.

Q. Did you ask him why?

A. There wasn't any money in town; there was no one spending any money at that time.

(Testimony of Joe Blackard.)

Q. Where did the money come from to buy the chips?

A. I have an idea that the fellows they had it themselves.

Q. Didn't you make any inquiry as to why the game wasn't making any money for the house?

A. When there are only three or four or five people around the table and you know that three or four or five of them that are sitting back there as shills or just sitting back there because they haven't got money or something, you just take it for granted there wasn't any money being made.

Q. You mean to say that for two weeks the house men played with one another? [801]

A. Oh, I don't know.

Q. How much of the profit were you to receive?

A. Well, if in a card game you are to receive half the profit.

Q. And the card games never made a nickel?

A. I don't know whether they did or not, I didn't receive any profit.

Q. None whatsoever? A. That is right.

Q. Not even a dollar?

A. To the best of my knowledge.

Q. Now when you bought the premises from Tibbitt what did you buy?

A. Oh, some equipment and good will, mostly.

Q. You paid \$20,000 for good will, did you?

A. No, I got some equipment, too.

Q. Well, what equipment did you get?

(Testimony of Joe Blackard.)

A. I got some equipment at the bar, I don't know exactly what it was. We had a bill of sale at that time.

Q. Where is the bill of sale at this time?

A. I don't know, it is possibly and probably burnt in the fire, unless you would have it like you got the rest of that stuff.

Q. When Mr. Tibbitt—the original lease Mr. Tibbitt had with Marvin Campbell's mother did that provide that it could [802] be assigned?

Mr. Cottis: I object, your Honor, the lease speaks for itself.

The Court: Overruled.

Q. (By Mr. McCutcheon): Could that lease be assigned? A. The original lease——

The Court: Wait a minute. Is the original lease in evidence?

Mr. Cottis: I don't know what counsel means by the "original lease" but a lease is in evidence.

The Court: Is counsel referring to the lease that is in evidence?

Mr. McCutcheon: I am not sure yet myself, your Honor.

Q. At the time you first negotiated with Mr. Tibbitt did he not have a lease with Mrs. Campbell at that time?

A. I imagine that he did, pretty sure that he did.

Q. And did he not negotiate a new lease with her? A. I think so.

Q. And the new lease could be assigned, could it?

(Testimony of Joe Blackard.)

A. One time to the best of my knowledge.

Q. Did you negotiate with Mr. Tibbitt before he got the new lease with Mrs. Campbell that it could be assigned once? A. That is right.

Q. How much did you pay Mrs. Campbell for the assignment? [803]

A. \$2,000 and a hundred dollars extra a month.

Q. And how much did you pay Tibbitt for the good will? A. \$20,000 plus equipment.

Q. What equipment?

A. Oh, I don't know, we had a bill of sale on it.

Q. Can you remember it to the best of your ability if the bill of sale is lost?

A. I don't know where the bill of sale is; I am afraid it is lost, I don't think we have it. I don't know whether Ralph has it, I know I don't have, although there was a bill of sale.

Q. As a matter of fact didn't you pay Tibbitt \$20,000 because he was able to get the privilege of one assignment from Mrs. Campbell?

A. Plus equipment.

Q. Can you remember any of the equipment?

A. There was a restaurant operating there.

Q. All right, what was there in it?

A. Oh, just whatever it takes to operate a restaurant. There was a counter and quite a bit of other stuff.

Q. Did you buy the bar or did that belong to Mrs. Campbell?

A. Well, I think that the bar had been remodeled

(Testimony of Joe Blackard.)

at one time—Tibbitt and Hardy had remodeled it—and on a lease you can't remove a bar from a lease, anything that is tied down.

Q. Then it belonged to Mrs. Campbell, didn't it?

A. I would say that it would. It would go to her at the end of the lease.

Q. Did you buy the cash register or did that belong to Mrs. Campbell?

A. I wouldn't say, I don't remember.

Q. How about the glassware, was that Mrs. Campbell's?

A. I don't believe it was, I don't know, I don't remember, there is quite a bit of stuff on there and I would be afraid to say that one thing was on and it would depend.

Q. Now, you say you started to put a cab stand in but Mrs. Campbell objected, is that right?

A. That is right.

Q. Did you know at that time that your lease prohibited you from putting in a cab stand?

A. I don't think it did.

Q. When you had the gambling games did you know your lease specifically prohibited your putting in gambling games?

A. Said that we could have card games.

Mr. Cottis: Object.

The Court: Overruled.

The Witness: The lease said we could have card games providing that they were approved by the law of the City of Anchorage and the Territory.

(Testimony of Joe Blackard.)

Q. If they were playing for money was that abiding by the law? [805]

A. I think the City was allowing, I think, if they played pan or anything it was allowed.

Q. Did you have any kind of a deal with Starns as to whiskey? Didn't you buy your whiskey from Starns?

A. No, I didn't, I bought most of my liquor and stuff from Anchorage Cold Storage and several other places and I bought a little bit that was originally that was bought by Mr. Starns from Tibbit and Mr. Hardy that was left in the storeroom, I bought some of that from him.

Q. How much did you pay for the quart of whiskey when you bought it from Mr. Starns as compared with the retail price here in town?

A. If I bought anything from Mr. Starns that way, and I did, he charged me the same thing that he would have to pay for it at Anchorage Cold Storage or that I would have to pay for it at Anchorage Cold Storage, I think.

Q. Didn't you have a deal with Mr. Starns that you paid double the value of the bottle and that was how he was in business with you?

A. I did not.

Q. At no time? A. At no time.

Q. You mean the two of you were on the lease and you constructed the premises but you bought your liquor from someone else? [806]

A. That I bought the liquor from someone else?

Q. Yes.

(Testimony of Joe Blackard.)

A. That is right, I bought the liquor from someone else.

Q. Did you testify that Mr. Barett complained to you about Humphries' credit?

A. No, I didn't say Mr. Barett, I said Mr. Andrews.

Q. Do you know Humphries owed Barett any money on April 1st? A. No, I don't.

Q. How much of a liquor stock did you carry on the premises?

A. Oh, at the time of the fire we had between four and five thousand dollars' worth.

Q. How much did you carry when you originally went in business?

A. When I originally went in business I didn't have but what Mr. Hardy and Mr. Tibbitt left on the back bar.

Q. How much was that?

A. I would say it was possibly \$500 worth or maybe \$800 or something like that.

Q. You paid Mr. Tibbitt \$20,000, is that correct?

A. That is right.

Q. Where did you get the \$20,000.

A. I went to the First National Bank and there was a little over \$11,000 I drew out—myself had in there of my own money, and I borrowed \$10,000 from Mr. Starns, and he put it in my name and I wrote the check for the whole thing. [807]

Q. Making a total of \$20,000?

A. Just a little over, if I remember right, on the liquor license.

(Testimony of Joe Blackard.)

Q. Who paid Mrs. Campbell the \$2,000?

A. Mr. Tibbitt paid Mrs. Campbell the \$2,000.

Q. Out of the \$20,000 you paid Mr. Tibbitt?

A. No, sir, he left \$2,000 in escrow in one of the banks in Seattle and if he signed that lease over to me the \$2,000 was to go to her, if he didn't he was to continue to hold the old lease that he had at \$300 a month and he was to keep his \$2,000, where if I get it, I was to pay \$400 a month plus \$2,000, and he gave a note—I gave him a note to pay him the \$2,000.

Q. How much did you have in The First National Bank?

A. I think that it was about \$11,000.

Q. And Mr. Starns loaned you ten thousand, did he? A. That is right.

Q. Made a total of \$21,000.

A. I think a little more than that, but I think that was approximately what the check was for.

Q. After you paid the \$20,000 to Mr. Tibbitt you had a thousand dollars left, is that correct?

A. No, Mr. Tibbitt had already bought the liquor license and we had to pay him—I reimbursed him. The liquor license cost around a thousand dollars and I reimbursed him for eleven months of that.

Q. So you paid him \$20,000 and reimbursed him for eleven months of his license, is that correct?

A. That is right.

Q. And you reimbursed him for—how much did you pay him for the license? How much did you reimburse him?

(Testimony of Joe Blackard.)

A. Just for the time that I had was to use it; it was around \$900.

Q. Then you had a hundred dollars left, is that correct? A. What do you mean?

Q. When you opened your business up?

A. I had some money over in the bank, too.

Q. Maybe I misunderstood, you say you took \$11,000 from the First National Bank plus \$10,000 from Mr. Starns, paid Tibbitt \$20,000 plus the portion of the share of the unexpired part of the liquor license?

A. I think you did misunderstand me, because I said that there was some more money left over there in the bank at that time.

Q. How much money was that?

A. I don't know, it was some of my money.

Q. How much was left?

A. I couldn't tell you.

Q. Was it \$5,000?

A. No, it wasn't that much, I would say it was from one to two thousand. I don't remember exactly, I know I had some [809] more money over there at the time.

Q. Well, did you take an inventory of the items that you purchased from Mr. Tibbitt?

A. That is right.

Q. Well, can you remember any part of that inventory?

A. No, I don't, it was kind of a mixed up inventory. The cafe Mr. Hardy and Mr. Tibbit had

(Testimony of Joe Blackard.)

put it in themselves after they originally got the place from Mrs. Campbell. Before they got the place there was a small bar, a liquor store and may be some magazines and some candy. Anyway, they buy the place and I don't know what he had in the place and don't remember some of the stuff, maybe a safe was there, maybe Mr. Tibitt bought a safe and they gave me a bill of sale for that. There were several things, and maybe a new cash register, maybe two cash registers; in fact, I never looked at the bill of sale after the time we got it.

Q. Do you recall what part of the \$20,000 was good will, can you remember that?

A. I am fully convinced that there was a greater portion of it that was or a portion of it.

Q. Do you recall whether or not you had the items insured that you purchased?

A. I didn't—

Mr. Cottis: Objected to as immaterial and no relevancy. [809A]

Q. (By Mr. McCutcheon): You didn't have them insured?

The Court: Wait a minute.

Mr. Cottis: Same objection, your Honor.

The Court: I do not at the present see the purpose of this examination as to what articles were bought from Tibbitt, what difference does it make as to the issues between the plaintiffs and defendants here?

Mr. McCutcheon: Well, if the Court please, he

(Testimony of Joe Blackard.)

contends that he owned a restaurant business and I would like to show that he had it insured and for how much.

The Court: Very well, the objection is overruled, he may answer.

Q. (By Mr. McCutcheon): What insurance did you have?

A. I didn't take the insurance out. Mr. Hardy and Mr. Tibbitt had taken out insurance and it was for \$3,000 and it was taken out before I went into the Panhandle on the restaurant and at the time that they left they assigned it to me for \$3,000 on the equipment that was there before that I went in and I did receive \$3,000 on that equipment.

The Court: What is the last part of your answer, sir?

The Witness: On the restaurant equipment I received \$3,000 from the insurance that Mr. Tibbitt and Mr. Hardy had taken out and had assigned to me. [810]

Q. (By Mr. McCutcheon): Now, did you have the restaurant equipment insured?

A. That was the insurance I was talking about.

Q. Did you have the type of insurance where you could be paid so much for the loss of a day's business?

Mr. Cottis: I object, your Honor, as completely irrelevant. This is obviously a fishing expedition as to Joe's collectibility in case plaintiffs should—

The Court: Overruled.

(Testimony of Joe Blackard.)

Q. (By Mr. McCutcheon): Did you have an insurance policy with Sheahan-Knox Agency insuring you against loss of business in case of a fire?

A. That is right.

Q. How much were you to receive?

Mr. Cottis: I object as irrelevant.

The Court: Overruled.

Q. (By Mr. McCutcheon): How much were you to receive?

A. I don't remember exactly what it was. It was called a business interruption, use and occupancy or something.

Q. Was it up to \$40,000?

A. No, it wasn't quite \$40,000.

Mr. Cottis: May it please the Court, there was not a word in direct examination about insurance and this is an improper cross-examination when he gets into that subject and I object to the whole matter of insurance except as it has [811] pertinency as to possible value or purchase price. If that is——

The Court: As far as the restaurant is concerned it is certainly relevant in my judgment.

Mr. Cottis: May it please the Court, is counsel restricted to inquiries respecting restaurant insurance?

Mr. McCutcheon: I am trying to cross-examine, sir, to bring out some of these points. Surely I am privileged to cross-examine to some extent.

The Court: It is necessary to stay within the scope of the direct examination and within the

(Testimony of Joe Blackard.)

scope of the pleadings. Now what insurance he has for loss of business at his bar doesn't bear upon the question here. Any insurance that there was upon the restaurant is revelant. No, there is no dispute here as to the ownership or right to operate the bar and, consequently, what the witness may have received or may receive in the future for the loss of the business at the bar has nothing to do with this case.

Q. (By Mr. McCutcheon): Mr. Blackard, I will hand you a paper here entitled "Insurance Policy" and ask you if it isn't made out in your name? A. That is right.

Q. And does it purport to insure the Panhandle Bar and Cafe?

A. I don't remember—don't know.

Q. Does it say Panhandle Bar—— [812]

Mr. Cottis: Same objection, your Honor.

The Court: Same ruling, overruled; if it refers to the Cafe it may be admitted.

The Witness: Joe Blackard, doing business as Panhandle Bar and Cafe.

Q. (By Mr. McCutcheon): What was the amount of that policy? A. For \$2500.

Q. And what was that insurance on with reference to the Cafe? A. I don't know.

Q. Well, at the time you entered into this insurance agreement you estimated the value of the Cafe to be less than \$2500, is that correct?

(Testimony of Joe Blackard.)

A. Of the stuff that I had in there.

Q. Well, I will hand you another paper that has a title "Insurance Policy" and ask you who that is made out to?

A. Joe Blackard, dba The Panhandle Bar and Cafe.

Q. What is the value of that insurance policy?

A. \$4,000.

Q. What was that on?

A. On merchandise and that was the merchandise that they paid me that \$4,000 on the merchandise on the liquor that I had on the bar side and they taken inventory and there was no inventory at all whatsoever on the cafe because at that time Mrs. Cavins owned all the inventory that would have been over at the Cafe. [813]

Q. Well, how much money and insurance did you collect altogether?

Mr. Cottis: I object, your Honor, as completely irrelevant.

The Court: Overruled.

The Witness: Now, do you mean the bar or the cafe?

Q. (By Mr. McCutcheon): The total amount of insurance on the Panhandle premises, what did you recover?

Mr. Cottis: May it please the Court, if I understood the Court's ruling, Mr. Blackard was to be restricted to restaurant insurance and counsel's question——

(Testimony of Joe Blackard.)

The Court: That is right, counsel has a right to inquire to determine whether the insurance is on the bar or the cafe. Witness may answer.

The Witness: I received \$3,000 on the cafe. I received \$4,000 on merchandise loss in the first and received——

The Court: When you say “merchandise” what merchandise do you mean?

The Witness: That was stuff lost that I had for my operation of the bar. At that time I didn’t own any merchandise on the cafe. Miss Cavins owned that.

Mr. Cottis: Then, your Honor, I ask that his testimony be stricken as to that portion pertaining to the bar.

The Court: Jury will disregard the testimony concerning [814] the bar. It has no relevancy here. What testimony concerning the cafe may be relevant is for the jury to decide how important it is, if at all

Q. (By Mr. McCutcheon): Well, I will hand you another insurance policy and ask you what that covers—as far as it pertains to the cafe?

A. Well, it has got me here again as doing business as the bar and the cafe, Joe Blackard’s Panhandle Bar and Cafe, 314 Fourth Avenue, Anchorage, Alaska.

Q. As far as the cafe what did that policy insure?

A. That covered the equipment I bought from

(Testimony of Joe Blackard.)

Mr. Starns—I mean Mr. Tibbitt and Mr. Hardy—when I originally went in there.

Q. What was the value of it?

A. I really don't know.

Q. How much does that insurance policy cover?

A. The insurance policy?

Q. I will withdraw that question for a moment, Mr. Blackard. Did you not have an insurance policy with Sheahan-Knox Agency covering you doing business in the bar and the cafe and covering you in the event the premises were destroyed or partially destroyed by fire, didn't you have an insurance policy that paid you so much a day for loss of business up to \$40,000?

Mr. Cottis: Objection, your Honor, unless it is restricted to the cafe and even then I object because none of it has [815] any bearing on the direct examination.

The Court: If any part of it has to do with the cafe and it was all blended together under one policy then the question must be answered; if the policy referred to the bar alone it has no relevancy here. You may answer the question.

The Witness: I don't remember when we taken out this policy, I think it was along the first of September this business interruption insurance. Mr. Sheahan at that time, it was his business to sell insurance and he came to my place quite often and he drinking there and he was a pretty good friend of mine, he comes in, oh, along the early in the

(Testimony of Joe Blackard.)

spring, may be along in March and wants to sell me this business interruption——

Mr. Cottis: I object, your Honor, the answer isn't responsive and I would like to have the question re-read.

The Court Better answer the question. The question was as to whether you took out such an insurance policy. You needn't go into all details as to how you came to take it out or not take it out.

The Witness: Not a \$40,000 policy.

The Court: Well, what did you take out?

The Witness: Thirty-seven five.

The Court: And how far did it apply to the cafe?

The Witness: It was on any business that I operated there and the Panhandle Bar and Cafe, and if I had a fire it was to cover that coverage to how had the fire was. [816]

The Court: Did it cover both the bar and the cafe?

The Witness: It covered both the bar—not the bar and no equipment, it covered the business, if I had taken away the right—that thirty-seven five—Mr. Beaver was keeping our books and they got him to arrive at those figures, I think we would take in \$45,000 in one year.

Q. (By Mr. McCutcheon): By thirty-seven five, do you mean \$37,500?

A. That is right, and for operation of the business for one year that would have been the profit

(Testimony of Joe Blackard.)

that the bar and the cafe, the air lines office and the \$175 from Larry Starns' liquor store would have taken in.

Q. Is there a dispute about the payment of that?

Mr. Cottis: Your Honor, I object.

The Court: I didn't hear the question.

Mr. McCutcheon: I asked if there was a dispute about the payment of it.

The Court: Objection sustained.

Q. (By Mr. McCutcheon): Have you been paid?

Mr. Cottis: Same objection, your Honor.

The Court: Sustained.

Q. (By Mr. McCutcheon): What part of that insurance policy covered the cafe?

A. The cafe was originally covered by the \$3,000 that Mr. [817] Hardy and Mr. Tibbitt gave to me when I bought the place—just a short while before I bought it they had went up to Ed Coffey not Sheahan—Ed Coffey and had a \$3,000 policy taken out. I didn't ever receive the policy that I remember and they assigned it over to me or told me to go change it and take it out of their name and put it in mine and Mr. Tibbitt and Mr. Hardy after the fire or just a short while back, less than a month ago, Mr. Tibbitt says that they have the \$3,000 policy still down at their place, that I never had it. I don't remember whether I got a duplicate or not. I know it was assigned over to me and the \$3,000 on the equipment was paid to me shortly after the fire.

(Testimony of Joe Blackard.)

Mr. McCutcheon: May we suspend?

The Court: It is now twelve o'clock. The trial will be continued until two o'clock.

Ladies and Gentlemen of the Jury, you will not discuss the case among yourselves or with others, nor listen to any conversation about it or form or express an opinion until it is finally submitted to you. [818]

Afternoon Session

The Court: Clerk may call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Mr. Blackard may resume the stand.

JOE BLACKARD

previously called as a witness on behalf of the defendants, resumed the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. When did you and Mr. Phillips first become partners, Mr. Blackard?

A. Shortly after we opened up the Panhandle.

Q. And how long after you opened the Panhandle was that?

A. I don't remember, Glen drew a couple of checks as a bartender—a month or six weeks—two months, something like that.

(Testimony of Joe Blackard.)

Q. And he is now working at the Village Bar, is that not right? A. I think so.

Mr. McCutcheon: No further questions.

The Court: Any further direct examination?

Mr. Cottis: Yes, your Honor.

Redirect Examination

By Mr. Cottis: [819]

Q. Joe, I call your attention to the affidavit dated May 17th and particularly to the statement in it over your signature that no gambling is permitted by me in the premises. I would like you to explain that statement, if you can, a little farther for the Court?

A. Well, we already at that time I had strictly had stopped it. I only allowed a game of any kind at all to go for about ten days there and Mr. Campbell was displeased and everyone was displeased. No one was making any money and we were getting a little traffic was all that was coming in. Some of the people were coming to play the games and that was on May 17th I signed this statement and there was no card playing. I think the tables were even turned bottom side up at that time and if they weren't they wasn't being used and hadn't been used for a teriffic—for quite a while.

Q. As nearly as you can remember how long prior to the date of that affidavit, May 17th, was it that you discontinued the card game?

(Testimony of Joe Blackard.)

A. Oh, six weeks to two months—for one to two months.

Q. And there had been no card playing permitted in there then since the first part of April sometime? A. I would say not.

Mr. Cottis: No further questions unless the Jury—— [820]

The Court: Any further cross-examination?

Recross-Examination

By Mr. McCutcheon:

Q. Mr. Blackard, in whose name was the liquor dispensing license issued?

A. It was mine and then when Glen Phillips it went in the combined, they put it in my name and Glen's name. When Mr. Tibbitt and Mr. Hardy transferred the license to my name and then a couple of months later it was transferred over to Mr. Phillip's name and mine.

Q. I would like to be clear on one, do you now deny or admit that there were gambling games conducted on the Panhandle premises during the period of time that the plaintiff held a lease there?

Mr. Cottis: I object to the question, your Honor, there is no evidence that the plaintiff ever held a lease there.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): During the period of time that an agreement existed between you and Mr. Humphries?

A. Now, what did you say again now?

(Testimony of Joe Blackard.)

Q. Do you now admit or deny that gambling games were conducted on the Panhandle premises during the period of time that an agreement existed between you and Mr. Humphries?

A. I said that we had card games there for about eight days to twelve days.

Q. Was that during the period of time that an agreement [821] existed between you and Mr. Humphries? A. I think so.

Q. Well, were the card games for money?

A. I didn't get any money from it. I have an idea that they probably were, yes.

Q. Well, you had a dealer there, didn't you?

A. That is right.

Q. And your agreement with the dealer was that you were receive fifty per cent of the profits, is that correct? A. If there was any money taken in.

Q. If there was any money taken in. Do you know why there wasn't any money taken in?

A. Well, there was no one particular playing the card games.

Q. Where was the money to come from that you hoped to take in?

Mr. Cottis: Your Honor, I object, the question is too vague.

The Court: Overruled.

Q. (By Mr. McCutcheon): Where was the money to come from that you hoped to take in?

A. That would come from a card game when a fellow sits down to play in a card game, I think.

(Testimony of Joe Blackard.)

Q. Did they sit down and play cards?

A. If they had a card game they must have.

Q. You were there off and one, weren't you?

A. Yes, I was around considerably.

Q. And what was the name of your first dealer?

(No response.)

Q. Who did you first employed as a dealer there?

A. I don't remember his name—go ahead.

Q. Did you employ someone else following him?

A. That is right.

Q. What was his name?

A. A fellow by the name of Preston.

Q. Then did you employ someone else?

A. No.

Q. Just the two dealers? A. That is right.

Q. And they were charged with the responsibility of running the card games, were they not?

A. They had access to my two tables that were sitting in the back of my place. If they got someone to play they could play. The tables were finally turned bottom up.

Q. The proposition was you were to get fifty-per cent of the profits, is that right?

A. If there were any profits.

Q. They played, didn't they?

A. They played.

Q. What kind of an agreement did the dealer have with those [823] who played?

A. I don't know.

(Testimony of Joe Blackard.)

Q. Didn't he take a percentage of the pot or the bet?
A. I don't know.

Q. Did you ever inquire as to why you weren't making any money out of the card games?

A. He said he was taking no money in.

Q. Did you know it was unlawful?

A. I wouldn't say it was unlawful, we were doing no more than——

Q. You know it is unlawful to play cards for money, don't you?

Mr. Cottis: Now, you Honor, I can't see what difference it makes whether Mr. Blackard does or doesn't know?

Mr. McCutcheon: On redirect examination, your Honor, counsel brought out the matter of the affidavit and that he denied that there was gambling on the premises at a certain time and I want to clear that point up.

The Court: This has been gone over before. I realize that cross-examination may have a wide scope. I think all of these questions were asked originally upon cross-examination.

Mr. McCutcheon: Very well.

Q. Is that your signature at the bottom of the page?

The Court: Witness may examine the paper if he desires?

The Witness: Could you show me this other part you are [824] talking about?

The Court: The question is, is your signature affixed?

(Testimony of Joe Blackard.)

The Witness: That is my signature.

The Court: That is the answer, the only proper answer. You may examine the whole paper, if you wish.

Q. (By Mr. McCutcheon): And that is a denial of the plaintiff's complaint, is it not?

A. To a certain extent.

Q. Now in the plaintiff's complaint it is alleged that you conducted gambling games there, is it not?

A. That is right.

Q. And in this answer you deny it, is that correct?

A. As far as I know I deny it.

Q. You denied it under oath, did you not?

A. I don't know.

Q. Well, what does it say at the bottom of the page there?

A. It says—doesn't say what—one or two is up on top.

Q. Wasn't it your understanding that when you signed that paper that you took the oath that the facts contained in that denial are true?

A. I imagine.

Q. Doesn't it say so there?

A. Says down at the bottom.

Q. When you took that oath before Mr. Cottis, didn't you [825] raise your hand and swear that it is true as it says there on the paper?

A. I imagine that I did.

Q. Now what do you say now, was there gambling there now or wasn't there?

A. I said there was card tables there.

(Testimony of Joe Blackard.)

Mr. Cottis: Your Honor, I object to this as having been asked before.

The Court: Objection overruled.

Q. (By Mr. McCutcheon): Did you not on May 10th, 1948, in the presence of the United States Commissioner, a jury of twelve, myself, Mr. Humphries, and Mr. Campbell and other persons being present, did you not then testify that there was no gambling on the premises? A. I don't know.

Q. How long did the games run?

A. We had fellows around the table back there and around the card games for about, I would say, eight to twelve days, something like that, and Mr. Campbell and everyone was very unhappy about the situtaion so we moved the boys out and cleared the tables away.

Q. Now, was that after a notice terminating your lease was served on you?

A. I don't know; I don't remember the date.

Q. Do you recall that a notice terminating your lease was [826] served on you because you were conducting gambling games in the premises?

A. Yes.

Q. And was it following that that you closed the games up? A. I don't think so.

Q. When was it that you closed the game up with reference to the time the notice was served on you?

(Testimony of Joe Blackard.)

A. It may have been before Mr. Campbell may have said something about he didn't like card games in here and it could have been that the city stopped it, I couldn't say.

Q. Mr. Campbell complained about the card games being there, is that not correct?

A. I said he might have.

Q. What occasioned you to think just now he complained about the card games?

A. I said he could have.

Q. Do you know whether or not he did?

A. I couldn't swear to it; I couldn't say that he did.

Q. And following the service of the notice terminating your lease you served a notice on Mr. Humphries to quit the premises, isn't that right?

Mr. Cottis: Not bearing upon the direct examination, object.

The Court: Overruled.

Q. (By McMcCutcheon): Isn't [827] it true that following the notice by Mrs. Campbell cancelling that you served a terminataion on Mr.—

A. I couldn't say.

Q. Wasn't the notice served on Mr. Humphries following the notice terminating the lease served on you? A. I said I don't know the dates.

Mr. Cottis: Your Honor, counsel has brought in new matter and I ask the Court's indulgence to ask one question?

The Court: Go ahead.

(Testimony of Joe Blackard.)

Mr. Cottis: Joe, the answer in this action which you signed denied this complaint and I would like to read to you the allegation in here with respect to gambling games—paragraph 14 “That defendants have maliciously, wilfully, unlawfully operated and conducted gambling games interfering with and otherwise being detrimental to plaintiff’s business, all to plaintiff’s damage.” Now at this time do you still deny that allegation 14?

A. The Witness: Yes, I would.

Mr. Cottis: That is all.

Mr. McCutcheon: May I close, your Honor?

The Court: Yes.

Q. (By Mr. McCutcheon): Now, do you deny that there were gambling games played there at that time and place, do you say that that isn’t true?

A. As far as I know, it wouldn’t be. [828]

Q. You don’t know whether or not there were gambling games back there?

A. I know there were card tables.

Q. Did the people play cards?

A. I would say they did.

Q. Did they have chips in front of them?

A. I imagine.

Q. And you had dealers working, would you, back there? A. There were dealers back there.

Q. And you swapped drinks for the chips?

A. I imagine they did.

Juror: Where did the mirrors in the restaurant come from?

(Testimony of Joe Blackard.)

The Witness: From the old back bar.

Juror: Were they there when you got the place from Tibbit?

A. Yes, we remodeled the old bar and put new mirrors up on it.

Juror: But they came with the place when you got it from Tibbitt and Hardy?

The Witness: Yes.

Juror: In this deal between Mr. Humphries and Mr. Graves do you know what that \$2500 or some such amount was supposed to buy?

The Witness: Yes, Ma'am. I don't think it was quite [829] \$2500, I don't know, but I don't think it was, and it was to buy some meat saws that Mr. Humphries was to cut his own meat and he was going—a meat saw is a great large saw—and he was to cut meat for Sunshine Market and a few other people so far as I remember, and he had a cube machine that wasn't in the place that he cubed his own steaks and I think there was a larger icebox—a 3-door icebox—that was to come with Mr. Graves' and he got the new stools instead of the old ones. He kept the new ones. There were old stools there but rather than keep those without backs he kept the new ones which had backs on them and the old stools were left in the basement and there was a few other things. I think there were more meat grinders or saws or something like that.

Juror: Did any of that price include any of the equipment within the restaurant proper?

(Testimony of Joe Blackard.)

The Witness: I have an idea there would have been a few odds and ins that Mr. Graves would have placed in there other than breakage and stuff. You see, there was a restaurant operating there when Mr. Graves came in, just about a year previous even, and I have an idea that that would have been just been breakage and stuff and extra dishes that he put in, maybe a few pans that he had bought to put in.

The Court: That is all, Mr. Blackard, you may step down; another witness may be called.

Mr. Cottis: I will call Laurence Starns. [830]

LAURENCE STARNS

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you spell your name, Larry?

A. Laurence Starns, L-a-u-r-e-n-c-e S-t-a-r-n-s.

Q. And you are the same Laurence Starns who is named as a defendant in this action?

A. Yes, sir.

Q. Did you operate a liquor store in the Panhandle premises in the spring of 1948?

A. Yes, sir.

Q. Under what arrangements and with whom did you operate that store?

A. I operated the store myself.

(Testimony of Laurence Starns.)

Q. Did you have a lease of the premises?

A. There was a lease, yes.

Q. And how did the lease run?

A. The lease was in Mr. Blackard and my name.

Q. Were you and Mr. Blackard partners?

A. No, sir.

Q. What was the relationship between the two of you?

A. I loaned Mr. Blackard a sum of money in order that he could make the deal with Mr. Tibbitt and Mr. Hardy for the bar. [831] And then in return for that he was to—I was to have space for a liquor store in that building.

Q. And were you to pay any portion of the rent?

A. I paid \$175 a month.

Q. To whom did you pay that?

A. I paid that to Mr. Blackard.

Q. Now what, if any, was your relationship with Vernon Humphries or Marvin Campbell?

A. I have never had any dealings with either one of them.

Q. Well, during February of 1948 while there was construction going on in the Panhandle premises did you hire Mr. Humphries as a paper hanger? A. I did not.

Q. Do you recall any conversations that you had with Humphries during that period?

A. No.

Q. Did you ever agree with Mr. Humphries that you would pay his plumbing bill?

A. No, sir.

(Testimony of Laurence Starns.)

Q. Who did the construction work for your liquor store at those premises?

A. I had my own crew of carpenters that were working on another job for me and I brought my own men and material in and did the work myself with the exception of the front—front of the building that Bliss did. [832]

Q. With respect to the front of the building what arrangement, if any, did you have with Blackard or with Bliss?

A. Well, I had no arrangement with Bliss at all; I had a talk with Mr. Blackard about it and told him that I would pay half on the front because I had to have an opening for my liquor store.

Q. Did you ever tell Humphries that you would take care of the three-thousand dollars' bond that he was supposed to furnish Blackard?

A. I never heard anything about it, don't know anything about it.

Q. Do you know why you are a defendant in this suit? A. I do not.

Mr. Cottis: Your witness.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. McCutcheon:

Q. You signed that assignment, did you not, Mr. Starns?

The Court: What document is counsel referring to?

(Testimony of Laurence Starns.)

Mr. McCutcheon: Plaintiff's Exhibit 18.

The Witness: Plaintiff's Exhibit 18, yes, sir, I signed that.

Q. And by that assignment you agreed to be bound by the terms of plaintiff's Exhibit No. 17, did you not?

A. This is the assignment of the lease? What was your question again? [833]

Q. And by that assignment you agreed to be bound by the terms of that lease, is that correct, plaintiff's Exhibit 17?

Mr. Cottis: Your Honor, the assignment speaks for itself and I object to the question.

The Court: Objection is sustained.

Mr. McCutcheon: Very well.

Q. You say you paid \$175 a month to Mr. Blackard? A. Yes, sir.

Q. And he paid the total sum to Mrs. Campbell, is that correct? A. As far as I know it is.

Q. What would happen to your position if Mr. Blackard failed to pay the rent?

A. I don't understand.

Q. If Blackard failed to pay the rent under the lease where would your position have been?

A. Well, I don't know.

Q. Well, weren't you interested in seeing that the rent was paid? A. I paid my rent.

Q. To Mr. Blackard? A. Yes.

Q. Did you consider yourself a sub-tenant of his? A. No. [834]

(Testimony of Laurence Starns.)

Q. You were a tenant of Mrs. Campbell's, were you not? A. Right.

Q. And you agreed that no gambling would be conducted on the premises, did you not?

A. I didn't conduct any gambling.

Q. You agreed that no gambling would be conducted on the premises, did you not?

A. As far as the gambling is concerned I don't know what you were talking about.

Q. Was there any gambling ever on the premises? A. I don't know.

Q. Did you ever see any?

A. I don't believe I was—in my liquor store, I was seldom in the rest of the premises.

Q. Were you ever in the restaurant premises?

A. Oh, yes, sir.

Q. Did you ever see any gambling there?

A. No, I don't recall seeing any gambling there.

Q. Did you ever see any card tables?

A. Yes, I seen card tables. There had been card tables in the Panhandle Building there for years and years.

Q. Weren't you concerned about the card tables being there, that it might constitute a violation of the lease that there might be gambling going on?

A. I don't get alarmed at seeing gambling.

Q. Now in connection with the construction of the remodeling didn't you and Mr. Blackard go to McCarrey and have an agreement drawn with reference to that remodeling?

A. With reference to what?

(Testimony of Laurence Starns.)

Q. With reference to the remodeling of the Panhandle premises, liquor store, front, bar and cafe?

A. Well, I recall going to Mr. McCarrey's office, yes, it was in relation to Mr. Bliss' contract with Mrs. Campbell, I believe. If I recall Mr. McCarrey had to o.k. the contract with Bliss for Mrs. Campbell before they would do any work. After we took over the lease Mrs. Campbell wanted to put up—wanted to remodel the building and put a new floor throughout. Well, before I could put my liquor store in or any work could be done we had to wait for that new floor to be put in.

Q. And she did do that, did she?

A. Yes, sir.

Q. Do you recall when a notice terminating the lease was served on you?

A. No, I don't recall the date.

Q. You remember that a notice was served on you, do you not?

A. Well, I don't recall it, no, I don't.

Q. Do you remember whether you were named defendant in an eviction suit?

A. No, I don't recall the date.

Q. Do you remember the trial? [836]

A. No, I don't remember the trial.

Q. Do you remember the outcome?

A. I don't know anything about it.

Q. Don't you remember testifying at that trial?

A. Now, wait a minute, what was it?

(Testimony of Laurence Starns.)

Q. Well, wasn't it last May 10, 1948?

(No response.)

Q. And haven't you posted bond on an appeal of that case? A. Where was the trial?

Q. Wasn't the trial in the United States Commissioner's Court in this Court House?

A. Did I testify?

Q. Well, I am asking the question?

A. It is possible I did, if I did the records will show it, I don't recall.

Q. Do you remember Mr. McGee testifying in your behalf?

Mr. Cottis: Your Honor, I fail to see the bearing on the direct examination.

Mr. McCutcheon: I am trying to help him out, he has lost his memory completely on that part.

The Court: Objection is overruled.

Q. (By Mr. McCutcheon): Don't you remember the owner of the Cheechako testifying for you?

(No response.) [837]

Q. Don't you recall Leo Tyler testifying for you?

Mr. Cottis: I object, your Honor——

The Witness: I don't believe I was present when that was taking place.

The Court: Overruled.

Q. (By Mr. McCutcheon): Don't you recall signing an appeal bond in connection with an eviction suit over the Panhandle premises a year ago?

(Testimony of Laurence Starns.)

A. May I see it, I can tell if I did.

Q. If you would like to. Does that help to refresh your memory? A. Yes, I signed this.

Q. That is an appeal bond from an eviction suit in the Commissioner's Court over eviction from the Panhandle, isn't that right? A. Yes, sir.

Mr. Cottis: I object, your Honor, on the grounds it has no relation to the direct examination.

The Court: Overruled.

Q. (By Mr. McCutcheon): Now, do you remember Mr. McGee testifying for you at that trial?

(No response.)

Q. Do you now remember it?

A. No, I don't.

Mr. Cottis: Your Honor, I object, he has answered the question, the fact that he has signed the bond is no indication that he was even present at the trial.

The Court: Overruled.

Q. (By Mr. McCutcheon): Now, do you remember Mr. Fred Mayer testifying for you, of the Cheechako Tavern?

A. I don't believe that I was present at that time.

Q. And do you remember Barney Perlman—

Mr. Cottis: Your Honor, I certainly object, the witness has answered again and again that he doesn't believe that he was present and Mr. McCutcheon is hauling out a stream of witnesses here.

The Court: Overruled, witness has testified that he had no interest in the operation of the premises

(Testimony of Laurence Starns.)

and this is, I think, legitimate cross-examination upon that point.

The Witness: I don't believe that I was present when Mr. Perlman testified.

Q. (By Mr. McCutcheon): Do you know Bob Brooks? A. Bob Brooks?

Q. Yes. And do you remember his testimony at that trial? A. No, sir.

Q. Who is Bob Brooks?

A. Well, if we are referring to the same person—— [839]

Mr. Cottis: Your Honor, we are getting into a collateral matter and I object further on that ground.

The Court: Overruled.

The Witness: Who is he?

Mr. McCutcheon: Yes, who is Bob Brooks and what is his occupation?

A. I don't know what he is doing right now.

Q. Do you know what his occupation was on May 10th, 1948?

A. I do not, no, sir, I have known Mr. Brooks for years but he has been in several different types of business and I don't know what he was doing at that time.

Q. Isn't his chief occupation the gambling business? A. I don't know.

Q. Do you know Barney Perlman?

A. Yes, sir.

Q. What is his occupation?

(Testimony of Laurence Starns.)

A. He was a card dealer, I think, and a bartender.

Mr. Cottis: Same objection, Your Honor, and an additional objection of this hauling names of gamblers out of a hat will give the jury some sort of notion that they had something to do with the Panhandle premises.

The Court: Objection is sustained and the jury will disregard testimony of gamblers if they did appear at another trial.

Mr. McCutcheon: Very well, sir. [840]

Q. Do you remember the trial now, Mr. Starns?

A. You told me the date, May 10th, that was during this period of time when I was finishing up my place out on east Fifth; in fact I opened it on May 22nd and I was spending practically all my time out there, and I remember—I recall about the time of the trial but I don't believe I spent any time there myself.

Q. But you do remember that a trial was had?

A. Yes, I do remember that there was a trial.

Q. And you do remember that you were a defendant? A. Yes.

Q. Now, did you say that you had no interest in the Panhandle business whatsoever?

A. I owned the liquor store. I had this interest in the bar that I had loaned Mr. Blackard \$10,000 and I had a chattel mortgage and recorded on his stock and equipment that he owned in there.

Q. Well, weren't you Mr. Humphries' landlord?

(Testimony of Laurence Starns.)

A. Not that I know of.

Q. Well, weren't you the tenant of Mrs. Campbell?

A. Yes, I was a tenant of Mrs. Campbell.

Q. And wasn't Mr. Humphries a sub-tenant of yours? A. Not of mine.

Mr. Cottis: Object, it calls for a conclusion.

The Court: Overruled. [841]

Q. (By Mr. McCutcheon): Wasn't Mr. Humphries a sub-tenant of yours?

A. Not of mine, no, sir.

Q. Who was he a sub-tenant of?

A. I don't know.

Mr. Cottis: Object, Your Honor, it is obviously outside the witness' knowledge.

The Court: Overruled.

Q. (By Mr. McCutcheon): Do you know whether or not he was a sub-tenant?

A. I do not.

Q. You saw him in the premises? A. Yes.

Q. Did you know that there was an agreement between him and Mr. Blackard?

A. I did not.

Q. You never discussed it with Mr. Blackard?

A. No, sir.

Q. You were not concerned with whom were tenants in the premises at all, is that correct?

A. No, I wasn't concerned, my only concern was the liquor store.

Q. Well, were you concerned as to whether or

(Testimony of Laurence Starns.)

not Mr. Blackard paid the rent to Mrs. Campbell?

A. I took it for granted that he did. [842]

Q. Well, were you concerned about it?

A. No, I wasn't concerned about it, you mean upset?

Q. No, wasn't that your business?

A. —

The Court: Counsel had better explain by what it means by "concern" it has several meanings.

Q. (By Mr. McCutcheon): Wasn't it very important to you—wasn't it your business—weren't you concerned about it—did it make any difference to you whether or not he paid the rent to Mrs. Campbell?

A. I thought he was paying the rent to Mrs. Campbell.

Q. You were concerned about it, it was of interest to you? A. Yes.

Q. As a matter of fact you agreed to pay her yourself, didn't you?—

(No response.)

Q. —you and Mr. Blackard?

Mr. Cottis: Your Honor, the agreement speaks for itself.

The Court: Well, the witness can answer, if he doesn't know that I don't know why he is testifying.

The Witness: It was my understanding of the original deal was that Mrs. Campbell—the reason

(Testimony of Laurence Starns.)

my name appears on the lease is that Mrs. Campbell would only permit one assignment of the lease, would only permit Mr. Tibbitt to make one assignment. My only interest was renting space there to put [843] in a liquor store. I had no desire to go into the bar business. I loaned Mr. Blackard \$10,000 so that he could make the deal and take over the place and in return I was to have the space for the liquor store. The reason my name was on the lease was because that Mrs. Campbell would only permit Mr. Tibbitt to make one assignment and one assignment only and for that reason the lease was made out to Mr. Blackard and myself.

Mr. McCutcheon: No further questions.

The Court: Any further direct examination?

Mr. Cottis: No, Your Honor, unless the jurors want to inquire?

(No response).

The Court: That is all, Mr. Starns, you may step down. Another witness may be called.

Mr. Cottis: With your indulgence, Your Honor, we will run into the witness room and see who is there.

The Court: Very well.

Mr. Cottis: Call Clyde Graves.

CLYDE GRAVES

called as a witness on behalf of the defendants,
being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Clyde Graves?

A. That is right. C-l-y-d-e G-r-a-v-e-s. [844]

Q. And what is your occupation, Mr. Graves?

A. I am General Manager of Universal Food
Service.

Q. Are you living in town now?

A. No, sir.

Q. When did you arrive in town?

A. At ten minutes after one today.

Q. Are you the same Clyde Graves who once
operated the restaurant at the Panhandle?

A. That is right.

Q. Do you recall Vern Humphries here?

A. Yes, sir.

Q. Did you have any dealings with him in con-
nection with that restaurant? A. I did.

Q. Will you tell us what they were?

A. Vern Humphries and Kenneth Havins they
bought the cafe from me; they paid me \$2250 for
it. They paid me \$1150 in a check and \$1100 in
cash.

Q. You are sure that they gave you a check?

A. Yes, sir.

Q. Do you recall who signed it?

(Testimony of Clyde Graves.)

A. I believe, I know it wasn't Vern himself, it was someone, but his last name was Humphries.

Q. And the total purchase price was \$2500 did you say? A. \$2250.

Q. Now, what went with the business or with the restaurant that you sold to Humphries?

A. I didn't get your question there.

Q. What, if anything, in the nature of inventory equipment, goodwill or that sort of thing was included in that sale?

A. I didn't sell him the food I had in the cafe, I sold that to someone else. I sold him the equipment that belonged to me. It was not furnished when I took over the cafe about a year before.

Q. It wasn't furnished?

A. No, not the equipment, it wasn't complete.

Q. Was it complete when you sold it to Humphries?

A. I figured it was, yes.

Q. Clyde, when you say "complete" do you mean complete in all respects as to dishes and equipment and utensils?

A. Yes, I would put it this way—I figure a cafe complete, what merchandise you have got to work with, it saves labor. I put in meat saw, icebox, I put in new counters and stools and I put in a grinder and miscellaneous dishes.

Q. How long had you operated the restaurant before you sold it to Humphries?

A. I would say 18 months.

(Testimony of Clyde Graves.)

Q. How had you done—good, bad or indifferent?

Mr. McCutcheon: Objected to as immaterial.

The Court: Objection is sustained. [846]

Mr. Cottis: Your Honor, I respectfully point out that the preceding business conducted there would have some bearing on whether there was any loss of profits to the plaintiffs here. They have been unable to provide any figures on their own operations.

The Court: Well, in every business much depend upon management, skill and so on, and I think if we open that door we may get in a vast volume of testimony that has very little bearing on the question.

Mr. Cottis: Very well, Your Honor, I will withdraw the question.

Q. Mr. Graves, I will put before you Defendant's Exhibit F and ask you whether you have ever seen it before. You may take your time and read it, if you like. Do you recall that, Mr. Graves?

A. I do.

Q. Is that your signature on it?

A. That is.

Q. As a witness? A. Yes, sir.

Q. Did you see the other people sign that?

A. I did.

Q. Are you sure, Mr. Graves, that you saw Humphries sign that? A. I did. [847]

Q. Are you sure that it was not another agreement similar to that but written in pencil?

(Testimony of Clyde Graves.)

A. No, sir.

Q. You are positive that that is the agreement that Humphries signed?

A. The fact is, I wrote this out first myself and I asked Joe, I said to me it wouldn't make good sense, I said why don't you write it out and let them sign it and I will witness it, and that is what we did.

Q. Do you recall which hand Mr. Humphries signed it with?

A. No, sir, I don't.

Q. How much of your purchase price did you say was paid by check? A. \$1150.

Q. Did the check clear all right?

A. No, sir, the fact it took three days before it finally cleared and I went and checked on the check first and there was insufficient funds in the bank.

Q. And do you recall about what day and month that was?

A. No, I would say—no, I couldn't say, I know it was in February sometime and I know it was on Friday, I do remember that.

Q. Did you ever see a bill of sale from Hardy and Tibbitt to Blackard?

A. No, sir, I didn't. [848]

Q. Did you ever have any dealings with Laurence Starns?

A. No, sir, I haven't.

Q. What was the condition of the equipment in the restaurant that you sold to Humphries?

(Testimony of Clyde Graves.)

A. I would say it was better than fair all the way through.

Q. Do you recall how long you had had that equipment?

A. Well, I would say only—on the meat grinder—on the meat saw—and the slicer—I had that about six months; on the icebox we put that in and I had to turn around and ship another unit from Seattle for it, so it didn't go in operation until I would say about three months before I got rid of the cafe.

Q. Had those items been purchased new or used?

A. All but the meat grinder had been purchased new, of course, that didn't include the new icebox, the icebox was brand new.

Q. How many iceboxes were on the premises at all, altogether?

A. You mean when I got it or when I left it?

Q. When you left it.

A. There were two, two in front and then there was one in the back, what we call a reach-in.

Q. Were all those included in your sale to Mr. Humphries?

A. No, sir, I didn't own the front little box or the back big box, that belonged to Joe.

Q. Both the little box in front and the big box in back? [849]

A. That is right.

Q. So, one of the three refrigerators was included in your sale? A. That is right.

(Testimony of Clyde Graves.)

The Court: Court will stand in recess until 15 minutes past three.

(Short recess.)

The Court: Without objection the record will show all members of the Jury present.

Q. (By Mr. Cottis): Mr. Graves, I show you what has been marked Plaintiff's Exhibit 4, purporting to be a bill of sale from you to Vern Humphries and I ask you whether you have ever seen it before? A. —

Q. You may use anything you like to refresh your recollection, if you have a copy of it or anything like that you are free to use it.

A. It is all the same except this last page—the one I have.

Q. What differences are there on the last page?

A. Electric meat slicer and an electric steak cuber, one electric refrigidaire and one large electric french fryer and one meat saw.

Q. Those are items that are not included on your copy of it? A. That is right.

Q. Did any of those items go from you to Humphries on that [850] transaction?

A. Yes, the slicer and the cuber, I wouldn't want to say about the french fryer or refrigidaire.

Q. Do you recall how they came to be left out of the original bill of sale?

A. Well, we came to agreement — what he wanted to pay for it—and so when we had this

(Testimony of Clyde Graves.)

made up I said whatever is on there that is good enough for me, and I said as long as I give you a bill of sale of it you can go ahead and do what you want with it.

Q. At the time you signed it, it was not in the form of Plaintiff's Exhibit 4, is that correct?

A. That is right.

Q. Were there any other changes made since the date that you signed?

A. Only Kenneth Havin's name has been marked off.

Q. Was that marked off at the time you put your signature on it? A. No, sir.

Q. In other words, your bill of sale ran to Humphries and to Kenneth Havins instead of just to Humphries alone, as that shows?

A. That is right.

Q. And your bill of sale did not include all the items included on the attached sheet? [851]

A. That is right.

Q. Although the actual transfer did include at least two or three of them?—

A. That is right.

Q. —that have been added? Did you ever authorize anyone to make any changes in that bill of sale? A. No, I didn't.

Q. Since the time that you signed it have you seen it prior to right now?

A. No, sir, I haven't.

Mr. Cottis: Your Witness.

(Testimony of Clyde Graves.)

Cross-Examination

By Mr. McCutcheon:

Q. Turn to page 2 of that bill of sale, Mr. Graves, is that the page with the list of equipment on it that was conveyed? A. That is right.

Q. And the list that you say was not on the original is written to one side of the right hand on a different typewriter, apparently, is that right?

A. I wouldn't say a different typewriter.

Q. Isn't it blacker than the other?

A. That is right.

Q. Isn't it a different style type?

A. I would say that.

Mr. McCutcheon: No further questions. [852]

The Court: That is all.

Mr. Cottis: No further questions unless the jury wants to inquire?

The Court: Has the jury any questions?

(No response.)

The Court: That is all, Mr. Graves, another witness may be called.

Mr. Cottis: Your Honor, I want to offer in evidence at this time Exhibit——

The Clerk: Marked for identification *Plaintiff's* Exhibit M.

Mr. Cottis: Would the Court care to see it; I intend to offer it in evidence just as it is since it is in the files in this action.

Mr. McCutcheon: Objected to, Your Honor, on the grounds that the proper foundation hasn't been laid for the introduction of such a matter.

The Court: May I see the file again. Objection is overruled and the exhibit may be admitted in evidence as Defendant's Exhibit M and may be read to the jury.

Mr. Cottis: And may it be withdrawn from its proper place in the file and admitted?

Mr. McCutcheon: Stipulate that the reading may be waived.

Mr. Cottis:

DEFENDANT'S EXHIBIT M

"United States of America,

"Territory of Alaska,

"Third Judicial Division—ss.

"I, the undersigned, United States Commissioner for the Anchorage Precinct, Third Judicial Division, Territory of Alaska, do hereby certify that the hereto attached is a full, true and correct copy of the Complaint and Judgment, United States of America vs. Vernon L. Humphries, Criminal Case #6325 on file and of record in my office.

"In testimony whereof, I have hereto subscribed my name and affixed my official seal at Anchorage, Alaska, this 17th day of May, 1948.

"/s/ ROSE WALSH,

"United States Commissioner and Recorder, Anchorage Precinct."

“In The United States Commissioner’s Court

“For The Territory Of Alaska

Third Division, Anchorage, Precinct at Anchorage.

No. 6325

“UNITED STATES OF AMERICA

vs.

“VERNON L. HUMPHRIES

COMPLAINT

For Violation of Section 7 Alaska Game Laws.

“Vernon L. Humphries is accused by Holger S. Larsen in this complaint of the crime of violation of game laws committed as follows, to wit:

“The said Vernon L. Humphries in the Territory of Alaska, and within the jurisdiction of this Court, did wilfully and unlawfully, [854]on the 12th day of April, 1948 in Anchorage, Alaska, in the back of the Panhandle Cafe did have in his possession moose meat illegally taken, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

“/s/ HOLGER S. LARSEN

“United States of America
Territory of Alaska—ss.

“I Holger S. Larsen, being first duly sworn, depose and say that the foregoing complaint is true.

“/s/ HOLGER S. LARSEN

“Subscribed and sworn to before me this 13th day of April, 1948.

[Seal] /s/ ROSE WALSH,

“Commissioner and ex-officio Justice of the Peace at Anchorage, Alaska.”

“In The Justice’s Court

“for the Precinct of Anchorage, District of Alaska,

“Third Division.

“United States Of America

“Vernon L. Humphries—ss.

No. 6325

Certified Copy of Judgment

“On the 13th day of April, 1948, the above named Vernon L. Humphries, having been brought before me, Rose Walsh, a [855] Commissioner and ex-officio Justice of the Peace, in a criminal action, for the crime of violation of section 7 Alaska Game Laws, and the said Vernon L. Humphries having thereupon pleaded guilty through his attorney, Stanley J. McCutcheon, ‘—Guilty,’ and having been duly tried by Court and upon such plea duly convicted, I have adjudged that he pay a fine of Two Hundred Fifty and no/100 Dollars, and that he pay the costs of the action taxed at..... Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding.....days.

[Seal.] /s/ ROSE WALSH

“Commissioner and Ex-Officio Justice of the peace.

“United States of America

“Territory of Alaska—ss.

“I, Rose Walsh, Commissioner and ex-officio Justice of the Peace; hereby certify the foregoing to be a full, true and correct Copy of the Judgment entered in the above entitled action.

“In witness whereof: I have hereunto set my hand and affixed the seal of said court at Anchorage, Alaska, this 17th day of May, 1948.

“[Seal] /s/ ROSE WALSH,
“Commissioner and Ex-Officio Justice of the
Peace.”

Mr. Cottis: Your Honor, may I recall for two questions of cross examination, Mr. Humphries regarding a proposed exhibit that I would like to put in evidence which did not come into my possession until after the adjournment of the last Court session prior to today.

Mr. McCutcheon: May I be heard, sir?

The Court: Yes.

Mr. McCutcheon: Counsel has had two cracks at cross examination of Mr. Humphries and now he wants a third. I submit, Sir, that that would be unfair regardless of what has turned up for him to be privileged of calling Mr. Humphries back to the stand for the purpose of cross examination. I protest.

Mr. Cottis: I have only cross-examined him once and I called him as my own witness the other time.

Mr. McCutcheon: Your Honor——

The Court: That is virtually a cross examination. The objection will be overruled and the plaintiff may take the stand for further examination.

The Clerk: It is marked Defendant's Exhibit N for identification.

VERN HUMPHRIES

previously called as a witness, resumed the stand and testified as follows:

Further Cross-Examination

By Mr. Cottis:

Q. Mr. Humphries, I show you Defendant's Exhibit N for identification and ask whether the person referred to therein is Vernon Humphries, yourself?

Mr. McCutcheon: I would like to see the docket before the answer, if the Court will allow me?

Mr. Cottis: It has been offered, Your Honor.

The Court: Counsel may see it.

Mr. McCutcheon: I would like to have the Court look at it before I argue an objection to the question. If the Court please, I object to the question on the grounds that it is incompetent, irrelevant, immaterial. Counsel has had ample opportunity for cross-examination when Mr. Humphries was on the stand, that would be the appropriate time to bring up the matter upon which counsel now wishes to develop into and it is highly prejudicial to the plaintiff's case and to the plaintiff's position to

(Testimony of Vern Humphries.)

permit counsel at this time to go into that question.

The Court: Does counsel have anything further?

Mr. McCutcheon: Only to say it is completely unfair for Mr. Cottis to be privileged now to inquire into that subject. Must we protect ourselves time after time against cross-examination? It seems unfair that he should be entitled to call the witness to the stand at any time he should choose for cross-examination and especially on a subject as vital as this and which should have been brought up on cross-examination in the [858] case in main when the witness was first on the stand.

Mr. Cottis: May I be heard, Your Honor?

The Court: The objection is overruled.

Q. (By Mr. Cottis): Question may be answered.

A. Yes, I signed it and I am proud of it, Mr. Cottis, that I pleaded guilty to grand larceny in the year of 1934 and I still say that it was all right and I haven't got a thing to be ashamed of or hide, sure I did nine months in a reformatory as a boy. I have a wife and three children and I tried to live it down, you like to bring it up.

The Court: Wait, just answer questions.

The Witness: I have answered it.

Mr. Cottis: No further questions, Your Honor.

The Witness: I would like to be heard more on it.

The Court: Over the objections of plaintiff's

(Testimony of Vern Humphries.)

counsel it may be admitted and may be read to the jury.

Mr. McCutcheon: I think it has been heard enough, if the Court please. I have no cross-examination.

The Court: That is all, sir.

Juror: Is it permissible to ask a question about something from the past?

The Court: Yes. The exhibit which you will receive presently shows the conviction of the defendant—plaintiff, rather, Vern Humphries, of an offense I think in the year 1934. [859]

Juror: I wanted to ask him this question—

The Court: Don't answer until I have a chance to rule.

Juror: Can you write your name with both hands?

The Witness: No, Ma'am.

Juror: I was going to ask if he could to give us a sample of his name in both hands?

The Court: Do you wish to give the juror a sample of your handwriting?

The Witness: Yes, I would.

The Court: All right, Clerk will supply a piece of paper. Your name at the top is written by you with which hand?

The Witness: With the left hand.

The Court: Will you mark the word "left" or "L" and the one below which is written with the right hand mark that "right." That paper will be

(Testimony of Vern Humphries.)
admitted in evidence and marked Exhibit No. 101.
It will not be attributed to either *plaint* or de-
fendants. Mark this 101.

The Clerk: Yes, sir.

The Court: It may go to the jury. Do counsel
wish to read the last exhibit?

Mr. Cottis: Yes, Your Honor.

“In the Superior Court of the State of Washington
in and for the County of Yakima.

“No. 4329

“THE STATE OF WASHINGTON,

“Plaintiff.

“vs.

“VERNON HUMPHRIES,

“Defendant.

“Judgment and Sentence”

“This case coming on before the court, in open
court, on this 3rd day of November, 1934, The State
of Washington being represented by the Prose-
cuting Attorney of Yakima County, and said de-
fendant Vernon Humphries, appearing in person
without counsel, defendant having waived counsel
in open court and the plaintiff having moved for
judgment and sentence of the court herein upon
said defendant, said defendant is informed by the
court of the nature of the information filed against
him charging him with having committed the crime

(Testimony of Vern Humphries.)

of Grand Larceny on count 1 and Burglary in the Second Degree on count 2 on or about the 19th day of October, 1934, of defendant's arraignment and plea of Guilty of the offense charged in said information upon each count.

"Whereupon, said defendant is asked by the court if he has any legal cause to show why Judgment should not be pronounced against him to which he replies that he has none that he has not already shown; and no sufficient cause being shown or appearing otherwise to the court, thereupon the Court renders its Judgment:

"That, whereas, said defendant has been duly convicted in this court on the 3rd day of November, A. D., 1934, of the crime of Grand Larceny on count 1 and Burglary in the Second Degree on count 2, it is therefore Ordered, Adjudged and Decreed that said defendant, Vernon Humphries is guilty of the crime of Grand Larceny on count 1 and Burglary in the Second Degree on [861] count 2 and that he be punished by confinement at hard labor in the Reformatory of the State of Washington for a period of not less than Nine Months nor more than Fifteen Years upon each of said counts, said sentences to run concurrently, and to pay the costs of this prosecution as the same may be hereafter taxed, said defendant Vernon Humphries is hereby remanded to the custody of the Sheriff of said County to be by him detained and delivered into the custody of the proper officers for transpor-

(Testimony of Vern Humphries.)

tation to the said Reformatory of the State of Washington, at Monroe, Washington.

“Done and signed by the Court in open Court, in the presence of defendant, on this 3rd day of November, 1934.

“DOLPH BARNETT,

“Judge.

“The State of Washington,

“County of Yakima—ss.

“I, Jasper W. Day, County Clerk and ex-officio Clerk of the Superior Court of the State of Washington, for the County of Yakima, do hereby certify the foregoing to be full, true and correct copy of the Judgment and Sentence duly rendered and made, by the Hon. Dolph Barnett, Judge of said Court, on the 3rd day of November, A. D., 1934, and now of record in my said office in the above entitled action.

“Attest my hand and the seal of the said Superior Court this 30th day of June, A. D., 1949.

“By /s/ RUBY S. JOHNSON,

“Deputy.

“[Seal] JASPER W. DAY,

“Clerk.”

The Witness: May I ask Mr. Cottis a question?

The Court: No.

(Testimony of Vern Humphries.)

Further Redirect-Examination

By Mr. McCutcheon:

Q. Do you care to say how old you are?

A. I was born in 1910.

Mr. Cottis: The defense rests, Your Honor.

The Court: The plaintiffs may call a witness in rebuttal.

Mr. McCutcheon: May we have a brief recess, Sir?

The Court: We will take the hourly recess now and we can go on through. Has counsel any idea how long it will take us to conclude the testimony or does counsel care to make any estimate?

Mr. McCutcheon: I doubt if we will put on any rebuttal.

The Court: Court will stand in recess for ten minutes.

(Short recess.)

The Court: Is there any rebuttal testimony?

Mr. McCutcheon: No, Your Honor.

The Court: Without objection the record will show all members of the jury present.

The Court: Next thing in order is instructions to the jury. I note here that counsel for defendant has just handed to me some eight instructions which, of course, I have not had time to read. None of them can be considered before giving the instructions. If counsel wish instructions to be considered [863] they ought to give them to the Court in time so that they could at least be read.

In the District Court for the Territory of Alaska
Third Division

No. A-4979

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Plaintiffs.

vs.

LAURENCE STARNES, JOE BLACKARD and
GLEN PHILLIPS,

Defendants.

which was filed on May 8, 1948.

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury: You are in-
structed as follows:

I (Page 1)

This case is a civil case in which Vern Humphries and Marvin Campbell are plaintiffs and Laurence Starnes, Joe Blackard and Glen Phillips are defendants.

In their amended complaint, which was filed on May 8, 1948, the plaintiffs allege that they are co-partners engaged in the restaurant business under the firm name and style of Alaska Food Service and that said business was located in the premises described as the Panhandle Bar and Cafe, at 314 Fourth Avenue, in the City of Anchorage, Alaska; that defendants hold a leasehold right in said premises by virtue of a lease from Anna K. [864]

Campbell, the owner of the premises, to the defendants; that on or about the 4th day of February 1948, at Anchorage, Alaska, the defendant Blackard entered into a written lease agreement with plaintiff, Humphries, a copy of which, as plaintiffs assert in their amended complaint, being attached thereto, whereby defendant, Blackard, agreed to lease to plaintiff, Humphries, for the period of one year, space in said premises adequate for the operation of a restaurant business and whereby defendant, Blackard, further agreed to furnish space, light, heat and water necessary for such operation and to provide the utensils and equipment for such operation; that it was further agreed by the terms of said agreement that the plaintiff would pay to defendant as rental for said premises six per cent of the gross receipts derived from all operations of said restaurant business or the sum of \$200.00, per month which ever might be the greater; that pursuant to an offer by defendant Blackard and accepted by Plaintiff Humphries, said agreement of lease was entered into, duly signed by both parties and possession of said restaurant premises delivered to plaintiff, Humphries, from defendant in accordance with the terms of said agreement; that relying on said agreement plaintiff expended large sums of money in the construction of a counter upon said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business including ranges, stools and other necessary fix-

tures and equipment; [865] that said counter and equipment was located in the southwest portion of said Panhandle premises and was there so located at the direction of the defendants; that plaintiffs at the time of filing said amended complaint were entitled to the possession of said restaurant premises in accordance with the agreement mentioned; that plaintiff performed all of the things and conditions required by said agreement to be performed by the lessee; that plaintiff commenced the operation of said restaurant business on or about March 6, 1948, and that after the commencing of said business, defendants maliciously, wilfully and wantonly interfered with plaintiffs' business resulting in great loss of profits to plaintiff; that on or about April 20, 1948, defendants took possession of plaintiffs' storeroom, a part of said leased premises, and failed and refused to permit plaintiff the use thereof; that defendants refused and neglected to provide plaintiffs with light, heat and water for said restaurant business as required by said agreement, to plaintiffs' damage in the sum of \$575.00; that defendants maliciously, wilfully and unlawfully operated and conducted gambling games, interfering with and otherwise being detrimental to plaintiffs' business, whereby plaintiffs' business was damaged; that defendants wilfully and maliciously injured plaintiffs' credit rating much to plaintiffs' damage; that on or about May 5, 1948, the defendants did with deliberate intent to injure plaintiff, maliciously, wilfully and wantonly prohibit

the [866] delivery of fuel oil to plaintiff whereby plaintiffs sustained damage; that on or about May 5, 1948, at the hour of 1:30 o'clock in the morning of said day the defendants took possession of plaintiffs' restaurant premises, shut off the cook range, locked the premises and announced to plaintiffs' customers that the premises were permanently closed and plaintiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs' business; that defendants threatened plaintiff with physical violence should plaintiff attempt to continue operating their restaurant business; that because of the acts of defendants, plaintiffs have been damaged in the sum of \$10,575.00.

The plaintiffs asked for judgment against the defendants in the sum of \$10,575.00 in actual damages and in the additional sum of \$10,000.00 in exemplary damages.

It appears from the undisputed testimony that since this action was brought the premises in question has been destroyed by fire. Accordingly the prayer of the plaintiffs' amended complaint that the defendants be restrained and enjoined from interfering with plaintiffs' business cannot be granted and this action is now resolved into an action to determine whether or not the plaintiffs are entitled to recover any damages from the defendants by reason of the evidence given in support of the plaintiffs' amended complaint.

To the plaintiffs' amended complaint, the defendants [867] on June 15, 1949, filed an answer

admitting the allegations of Paragraphs 1 and 2 of the amended complaint and denying all other averments contained in the amended complaint. You will observe that Paragraphs 1 and 2 of the amended complaint allege that plaintiffs are co-partners engaged in the restaurant business under the firm name and style of Alaska Food Service, and that the business at the time of the filing of the amended complaint was located in the Panhandle Bar and Cafe, at 314 Fourth Avenue, in the City of Anchorage, Alaska, and that the defendants held a lease-hold right in said premises by virtue of a lease from the owners, Anna K. Campbell, to the defendants. It is, therefore, obvious that the defendants have denied all of the averments which in any manner allege that the plaintiffs have been damaged by any acts or omissions of the defendants. The foregoing constitutes a condensed statement of what the respective parties assert in their pleadings in this case. When you retire to consider of your verdict you will take with you to the jury room the pleadings in the case consisting of plaintiffs' amended complaint and the defendants' answer thereto so that you may there read and consider of said pleadings and determine the precise nature of the respective claims of the plaintiffs and of the defendants as stated in their pleadings.

I-A

In their amended complaint, the plaintiffs state that [868] a copy of the alleged lease is attached to and made a part of the amended complaint, but

the plaintiff, Humphries, in his testimony stated, in substance, that the written agreement on which the plaintiffs rely differs in some respects from the agreement of which a copy is attached to the plaintiffs' amended complaint, and that the agreement finally entered into between the parties is the one of which a copy is attached to the amended complaint in cause No. A-5001, introduced in evidence during the trial and marked plaintiffs' Exhibit No. 3. Plaintiff, Humphries, in his testimony also asserted that the final written agreement entered into between the parties was thereafter modified by oral agreement or agreements, concerning the furnishing of a bond and otherwise.

Nothing in the law prevents or forbids the change, alteration or modification by oral agreement of such a written agreement as that relied upon here by either the plaintiff or the defendant.

It is for you to determine from all of the evidence what agreements, oral or written, or both, were entered into between plaintiffs and defendants.

III.

In this case, as in all civil cases, the burden is upon the plaintiffs to prove their case by a preponderance of the evidence only; and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evidence. [869] If the evidence in your mind is equally balanced as between the plaintiffs and defendants then the verdict should be for the de-

defendants because the burden is upon the plaintiffs to present evidence of greater weight than that in favor of the defendants before plaintiffs are entitled to recover.

IV.

As you know, three persons have been named as defendants in this action, Laurence Starns, Joe Blackard and Glen Phillips. It is for you to determine whether any or some or all of the defendants or defendant Blackard only, are liable to respond in damages to the plaintiffs in this action. This is not to suggest that any of the defendants is so liable, because that is a matter for your decision and determination. However, it appears by undisputed testimony that neither the defendant, Starns, nor the defendant, Phillips, signed any written agreement between the parties and that any such written agreement was signed by the defendant, Blackard, only, of the three defendants named. It is thus within your province to find for the plaintiffs and against the defendant, Blackard, or the defendant, Blackard, and either or both of the defendants, Starns and Phillips, or to find in favor of all of the defendants and against the plaintiffs.

If you find that the plaintiffs have proved the material averments of their complaint by a preponderance of the evidence, [870] and thus that the plaintiffs are entitled to recover, you should return a verdict accordingly in favor of the plaintiffs and against all of the defendants, or against the defendant, Blackard, and either or both of the other

defendants, Starns and Phillips, the verdict being confined to such damages as represents the actual loss sustained by the plaintiffs by reason of the wrongful acts of the defendants, or such of them as you find liable for the damages sustained by the plaintiffs. But unless you find that the plaintiffs have so proved their case by a preponderance of the evidence, then you should return a verdict in favor of the defendants and against the plaintiffs.

V.

If you find in favor of the plaintiffs and against the defendants, or any of them, your verdict must be founded upon the evidence admitted in the trial and the inferences naturally and reasonably to be drawn therefrom, and upon the law as contained in these instructions. Verdicts for damages in all cases must be such as are based upon the evidence, and are fully supported by the evidence, and not upon speculation, conjecture or surmise; and in this case only such damages, if any, should be awarded to plaintiffs as may be reasonably ascertained.

VI.

Plaintiffs claim that they were damaged by the maintenance of gaming by cards by defendants, or one or some of them, in the place of business of which the plaintiffs occupied a part [871] for restaurant purposes. The fact that the defendants, or one or more of them may have violated the law will not justify you in returning a verdict against

said defendants or either of them, unless you further find that the plaintiffs were injured by the maintenance and carrying on of such gaming operations. Moreover if the plaintiffs, or either of them, knew in advance before the written contract was entered into that such gaming operations were to be carried on by the defendants, or one or more of them, then the plaintiffs are estopped to claim any damages by reason of such gaming.

VII.

The jury is instructed that they should bring to bear upon the consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which they, as reasonable human beings, have and exercise in every-day affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

VII-A

Evidence has been admitted for the purpose of showing previous conviction of crime of the plaintiff, Vernon Humphries. That evidence was admitted only because it may, [872] in your judgment, possibly affect or have bearing upon the credit of said plaintiff as a witness, and for no other purpose whatever. Whether the credibility of the plaintiff,

Humphries as a witness, is or is not affected by such evidence of previous conviction of crime is for you to determine. With respect to this evidence as with all other evidence you are subject to the limitations of these instructions, the sole judges of its weight and value.

VIII.

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you may believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court. [873]

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account

the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

IX.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not product conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds. [874]

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own

intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

X.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

XI.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are [875] not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But ar-

guments of counsel if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

XII.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the [876] views and opinions of other jurors.

XIII.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the conclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

XIV

Upon retiring to the jury room to consider your verdict, you will elect one of your number foreman, who will speak for you and date and sign the verdict unanimously agreed upon. When you retire you will take with you to the jury room the pleadings in the case, consisting of the plaintiffs' amended complaint and the defendants' answer thereto, the exhibits, these instructions and two forms of verdict.

If you find for the plaintiffs and against the defendants or any of them, you should use the form of verdict which has [877] been prepared for that contingency and your foreman will insert therein the amount which you find the plaintiffs are entitled to recover and also insert therein the names of the defendants, one or more or all of them, from whom you find the plaintiffs are entitled to so recover. The verdict should then be dated and signed

by your foreman and returned into Court as your verdict.

If you find for the defendants and against the plaintiffs, you should use the verdict which has been prepared for that contingency and your foreman should date and sign the same and return the same into Court as your verdict.

The verdict not used should be destroyed by your foreman.

With your verdict you will return into Court the pleadings, the exhibits and these instructions.

Dated at Anchorage, Alaska, this 5th day of July, 1949, and I have signed it as District Judge.

The Court: Instructions having been read to the jury counsel may now come to the bench. Counsel for plaintiffs may take exceptions.

Mr. McCutcheon: No exceptions.

The Court: Counsel for defendants may except.

Mr. Cottis: Your Honor, I ask for an instruction as to Blackard's right to terminate that contract by its very terms.

The Court: Well, if you handed it up, Mr. Cottis, just [878] as I started to read the instruction——

Mr. Cottis: I realize that, Your Honor, but I expected rebuttal testimony and the girls didn't fetch it along.

The Court: I will consider the proposed instructions and if I think justice would be denied by failure to give the instruction I will give it, however, you can take the exception.

Mr. Cottis: In that respect may I elaborate?

The Court: Certainly, it may be highly necessary.

Mr. Cottis: The agreement between the plaintiff and the defendant has been referred to repeatedly both in the complaint and in testimony and by Mr. McCutcheon as a lease, we are all familiar with OPA regulations or know that there are such things and eviction difficulties and I feel that without no instruction they might think that that 24-hour right of termination is invalid and have peculiar notions of what the law is and feel that it is wrong of Blackard to serve a termination notice effective on 24 hours, so I would like an instruction to the effect that that was a matter of proper agreement between the proper parties that the undisputed testimony is that that notice was served and that the plaintiffs after the 24 hours had expired were trespassers on the premises and that in order to entitle the plaintiffs to damages for any of these alleged wrongdoings the jury must find that they occurred after April 16th.

The Court: After what? [879]

Mr. Cottis: Prior to April 16th.

I request that an instruction be included, because of the wealth of testimony in here, to the effect that there is nothing in the complaint about failure to reimburse the plaintiffs for inventory of stock at the time that the contract was terminated and therefore the jury cannot base any damages on any inventory of merchandise that Humphries might have left in the restaurant.

Your Honor, because of the complaint asking for punitive damages, it is my recollection that the Court sometimes gives an instruction on what the jury could properly base punitive damages.

The Court: That was overlooked, I shall include it. I should have thought of it before and didn't—it escaped me.

Mr. Cottis: And I request an instruction that there has been no showing of loss of profits on the part of the plaintiffs sufficient for the jury to consider.

I request an instruction that the jury disregard all testimony regarding moose meat; that it is a collateral to the judgment and a judgment cannot be attacked collaterally. It was offered before plaintiffs' rebuttal testimony and therefore the judgment was not in evidence at that time, that is, all that testimony regarding moose meat and who was there and the Marshal and so forth is a collateral part and the judgment that is put in evidence was after that and I asked that the jury [880] be instructed to disregard all testimony regarding Humphries' purchase of equipment because the Court permitted that testimony to go in originally subject to a motion to strike it at any time if it was not connected up and I urge that it has not been connected up with the complaint in any respect.

I have no exceptions to the form of instructions here, however.

The Court: All of the exceptions will be noted as of course.

Do you gentlemen care to state how much time you want to argue the case? The reason I ask I may be able to call the jury tomorrow afternoon to start the next case; do you want to do that?

Mr. McCutcheon: What is the next case?

The Court: It is your case. Counsel for plaintiffs may make opening argument to the jury.

Mr. McCutcheon: If the Court please, Mr. Cottis, Ladies and Gentlemen of the Jury. I am not going to take your time in final argument, but only wish to thank you for your patience and diligence during the course of this trial. It has been a long, hard, hot case and I know that it must have taxed your patience a great deal and for that I thank you.

The Court: Counsel for defendants may proceed.

Mr. Cottis: May I inquire, was that plaintiffs' opening argument? [881]

Mr. McCutcheon: That was my opening.

Mr. Cottis: I will waive my right to argue, then.

The Court: The case will go to the jury. There is one more instruction I must give and it will be an instruction concerning exemplary damages. I regret to say that I overlooked it and it is necessary or advisable at least that you should have it.

The Court will presently stand in recess, I am wondering if counsel will agree to a sealed verdict?

Mr. McCutcheon: Yes, Your Honor.

Mr. Cottis: Yes, Your Honor.

The Court: I wish in view of this development

that the Clerk would have somebody in the Clerk's office try to get in touch with the jurors who are excused and have them report tomorrow morning at ten o'clock.

Court will stand in recess for ten minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Ladies and Gentlemen of the Jury, the plaintiffs in their complaint ask for both compensatory damages, ordinary damages as they are sometimes called, and punitive or exemplary damages, and therefore upon suggestion of counsel it is necessary to give you an instruction upon the law concerning punitive damages. It was omitted in the first place simply through oversight. [882] This instruction is neither less important or more important than the other instructions because it happens to come in last. It is just one of the instructions. It is numbered 5-A, and will be inserted accordingly in the instructions.

5-A

Damages are of two kinds, compensatory and punitive. Compensatory damages mean what the name indicate, compensation for damages sustained.

The plaintiffs in this case have asked for both compensatory and punitive damages, the latter being sometimes called exemplary damages. Punitive damages may not be awarded in any case unless the

jury finds that the plaintiffs are entitled to compensatory damages in some amount.

If you find in this case that the plaintiffs are entitled to recover damages from the defendants or any of them then you may consider whether you ought to allow recovery also of punitive damages. Under the law, punitive damages are damages that are given by way of punishment, sometimes in the nature of a fine in a criminal case, except that in a civil action such as this, any amount awarded as punitive damages is paid to the plaintiffs.

To justify an award of punitive damages you must find that the defendant or defendants against whom the punitive damages are assessed acted with actual malice in some of the material respects set out in plaintiffs' amended complaint. [883] Actual malice implies ill will and it may be proven directly or indirectly, that is to say by direct evidence of evil motive and intent, or by legitimate inference to be drawn from other facts and circumstances in evidence. It is for you to say whether under all of the evidence in this case, actual malice on the part of any of the defendants toward the plaintiffs or either of them has been shown. Actual malice manifested by one of the defendants would not justify you in returning a verdict for punitive damages against any other of the defendants. The granting or withholding of an award of punitive damages is entirely within your discretion, even upon the clearest proof of actual malice.

The Court: Does counsel desire to take excep-

tions from this instruction? They may come to the bench.

Mr. Cottis: No exception.

Mr. McCutcheon: No exception.

The Court: This will be added. Now the verdicts have not been prepared but they will be sent up to you by the Bailiffs later, and quite soon, and counsel will be supplied with copies. The forms of verdict will be as usual.

The jury may note that none of the pages in these instructions is numbered 2. That was omitted in order to fit in another instruction and finally the instruction was not included.

Bailiffs may be sworn. [884]

(Oath administered by Clerk.)

The Court: Perhaps I had better ask counsel whether they have any objections to my sending forms of verdict to the jury after they retire by the Bailiff?

Mr. McCutcheon: Plaintiff has no objection.

Mr. Cottis: I have none, Your Honor, and might I suggest that the sealed verdict provisions go into effect at six or must they go into effect at five?

The Court: I think we may as well, it is very close to five o'clock. I think the sealed verdict, if it is agreeable to counsel the sealed verdict provisions can go into effect now. If counsel do not wish it that way the Court will do whatever counsel desire in that respect, because counsel aren't obliged to consent to any sealed verdict.

Mr. Cottis: I have no objection, Your Honor, I merely wanted to make a suggestion.

The Court: The sealed verdict provision will go into effect now.

Ladies and Gentlemen of the Jury, I think you are familiar with procedure which is known as returning a sealed verdict and with the other papers you will be given an envelope containing this endorsement: First the title of the cause and then the words "Sealed Verdict" and then "Ladies and Gentlemen of the Jury: If you have not reached a verdict by five P. M. o'clock, today, then when you have agreed upon a verdict, have [885] the foreman sign the same, seal it up in this envelope, and keep it in his possession, unopened. You may then separate and go to your homes. No juror must say anything about the verdict agreed upon. All the jurymen must be in the jury box in court at 10 o'clock A. M. of Wednesday, July 6th, 1949, at which time the verdict will be handed to the Court and opened in the presence of the jury.

"Dated at Anchorage, Alaska, this 5th day of July, 1949.

"I have signed it as District Judge. It has been signed approved by attorneys for the parties."

This is a procedure which permits you immediately to separate and go to your homes when you have arrived at a verdict and you need not await the coming in of the Judge and counsel and Clerk.

That envelope will go with the other papers when you retire, and the two forms of verdict—one of

which can be used by you according to your decisions—will be sent up to you and handed to you by the Bailiff later. They are not now prepared.

Ladies and Gentlemen of the Jury you may now retire to consider of your verdict.

(Whereupon, at 4:50 p. m., July 5, 1949, the case was closed.) [886]

United States of America
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Reporter for the District Court of the United States, Territory of Alaska, Third Division, hereby certify the above and foregoing 886 pages to be a true and correct transcript of the proceedings had of the testimony in the above entitled matter in said Court at the times and places as set forth.

Dated: January 19, 1950.

/s/ OREN J. CASEY

Certified Shorthand Reporter

[Endorsed]: Filed January 28, 1950.

CERTIFICATE

I, M. E. S. Brunelle, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify the enclosed file is a complete file of all original papers, except the Supersedeas Bond, as docketed in the records of this Court, in the cause number A-4979, entitled Vern Humphries and Marvin Campbell, Plaintiffs, vs. Laurence Starns, Joe Blackard and Glen Phillips, Defendants.

/s/ M. E. S. BRUNELLE,
Clerk of the District Court

[Endorsed]: Filed March 20, 1950.

[Endorsed]: No. 12503. United States Court of Appeals for the Ninth Circuit. Laurence Starns, Appellant, vs. Vern Humphries and Marvin Campbell, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed March 17, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12503

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

1. The Court erred in refusing to make findings of fact and conclusions of law.

2. The Court erred in refusing to charge the jury appellant's requested instructions Nos. 1, 2, 3, 7 and 8.

3. The Court erred in refusing to grant appellant's "Motion to Reject Verdict of Jury and for Alternative Relief."

4. The Court erred in failing to frame specific issues for the jury's consideration.

5. The Court erred in permitting the inclusion of punitive damages in the judgment.

6. The Court erred in permitting testimony of the circumstances regarding the conviction of one of the plaintiffs for having possession of illegal moose meat.

7. The Court erred in permitting testimony regarding fire insurance policies.

8. The Court erred in admitting in evidence testimony regarding the cost of restaurant equipment.

9. The Court erred in directing counsel for the defendants in the presence of the jury to produce a document allegedly drawn by plaintiff's attorney when there was no evidence that defendant's counsel had ever seen it or had it in his possession.

10. The Court erred in permitting the plaintiff Humphries to testify regarding his alleged service in putting up wall paper since this was not a part of the complaint.

11. The Court erred in permitting testimony regarding the inventory of stock left on the premises by the plaintiffs, since the purported cause of action had nothing to do with such an inventory.

12. The Court erred in permitting testimony about a supplemental contract claimed by the plaintiff Humphries to have been made orally, under which the defendant Starns was to pay plaintiffs' construction costs, for this claim was not included in the amended complaint.

13. The Court erred in permitting plaintiffs' attorney to link with the defendants the names of persons having wide local repute as gamblers.

14. The Court erred in permitting plaintiffs' attorney in cross-examination of the defendant Starns to infer without justification that the defendant Starns had an illegal agreement with the defendant Blackard since this was no part of the alleged cause of action and did not bear on the direct testimony.

15. The Court erred in permitting evidence regarding loss of business from five additional seats in the restaurant counter had the Starns liquor store been located elsewhere since no such claim was a part of the plaintiff's cause of action.

16. The Court erred in allowing \$255.00 in plaintiffs' cost bill as mileage for Mr. Humphries and the same sum as mileage for Mr. Campbell.

Dated at Anchorage, Alaska, this 24th day of March, 1950.

/s/ RALPH H. COTTIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 27, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD
MATERIAL TO CONSIDERATION OF AP-
PEAL

1. Amended complaint.
2. Answer verified 24 May, 1948, and filed June 15, 1949.
3. Verdict.
4. Motion to reject verdict of jury and for alternative relief.
5. Judgment.
6. Motion for findings of fact.

7. Hearings on motion to require findings of fact entered in journal G20, page 173, November 18, 1949.

8. Notice of appeal.

9. Order granting extension.

10. Opinion dated 30 December, 1949.

11. Second amended cost bill.

12. Objections to second amended cost bill.

13. Second amended cost bill; objections thereto; and order rendered 24 February, 1950.

14. Order of court rendered 2-18-49.

15. Transcript of testimony.

16. Defendants' requested instructions numbered 1, 2, 3, 7 and 8.

17. Original copies of plaintiff's exhibits 1, 2, 3 and 22; defendants' exhibits J, K, L, M.

Dated at Anchorage, Alaska, this 24th day of March, 1950.

/s/ RALPH H. COTTIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 27, 1950.